Supreme Court, U.S.
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No. 06-420

In The

Supreme Court of the United States

RAYMOND ALEXANDER,

Petitioner,

v.

PAUL STOWITZKY, SUPERINTENDENT, SRCF MERCER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause is violated by an unmitigated prosecutorial closing argument, in a closely contested sexual assault case, that tells jurors that their verdict of acquittal will revictimize the complainant, an argument type that is recurring in the trial courts?

2. Does not the Constitution require, especially in light of this Court's recent unanimous holding in *Holmes v. South Carolina*, that an accused with the burden of proving the affirmative defense of mistake of age be permitted to present to the jury the evidence relied on, to wit, the complainant's own words and deeds that she purposely made known to the accused, including her self-depiction as a "slightly experienced" eighteen year old?

3. Do not the Due Process and effective assistance of counsel guarantees entitle a criminal accused to prevent trial by, and to respond to, false evidence adduced by the prosecution?

4. Does not this Court's holding in *Miller-El v. Cockrell* require the grant of a certificate of appealability on petitioner's Due Process and Sixth Amendment claims, when the Third Circuit's denial of the certificate was premised on a clearly erroneous presumption of correctness for trial court fact findings that are proved to be unreasonable by clear and convincing record evidence, and when petitioner demonstrated that reasonable jurists would find the District Court's assessments of the constitutional claims debatable or wrong?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Respondent is represented by the Office of the District Attorney of Bucks County, Pennsylvania.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Raymond Alexander, respectfully prays that the Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit, filed on January 24, 2006 (Petition for Rehearing denied on June 28, 2006), which denied habeas relief from his conviction and sentence for sexual assault and related offenses.

OPINIONS BELOW

The opinion of the Third Circuit is a Memorandum found at Appendix 1. The opinion of the District Court, also unreported, is found at Appendix 19. The Magistrate Report and Recommendation is found at Appendix 68. The decision of the Pennsylvania Superior Court, also unreported, is found at Appendix 140. The Trial Court Opinion is found at Appendix 113.

JURISDICTION

The decision of the Third Circuit denying rehearing was rendered on June 28, 2006. Appendix 154. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process

> for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

and Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Relevant Facts and Procedural History

This petition arises from the denial of habeas relief (but issuance of a Certificate of Appealability on one claim) from a state (Pennsylvania) court prosecution for sexual assault and related offenses. The defense was dual: petitioner did not know, and was reasonably mistaken regarding, the age of the complainant, who advertised herself over the Internet as eighteen years old and "slightly experienced"; and there was no sexual penetration.

Three occurrences demonstrate the unconstitutionality of the proceedings. The prosecutor's closing argument (to which an objection was overruled and no curative instruction was given) equated an acquittal with a second rape of the complainant; compelling evidence supporting the reasonable mistake affirmative defense and necessary for effective cross-examination was precluded; and false evidence was used to attack the credibility of petitioner's core affirmative defense, and trial counsel made no effort to establish its falsity despite his possession of police reports proving the same.

a. The Course of Proceedings

On May 6, 2000, petitioner was arrested in his Pennsylvania home in the company of Carrie Williams, who was from Kentucky and under the age of eighteen. Petitioner

was initially charged with Interfering with the Custody of a Minor; charges of Statutory Sexual Assault and Corrupting the Morals of a Minor were added at the arraignment; and the charge of Involuntary Deviate Sexual Intercourse was added months later, after the complainant changed her version of events to include such conduct.

On March 26, 2001, trial commenced before Judge Biester and a jury in Bucks County, Pennsylvania. Counsel for petitioner litigated a Motion seeking admission of evidence that the complainant had a prior relationship with another older man. That Motion was denied. Petitioner was acquitted of Interfering with the Custody of a Minor and convicted of Involuntary Deviate Sexual Intercourse, Statutory Sexual Assault, and Corrupting the Morals of a Minor.

An appeal to the Pennsylvania Superior Court was denied, as was a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. A timely application for a Writ of Habeas Corpus was brought; after the Magistrate Judge recommended against it being granted, and exceptions were filed, the District Court entered an ORDER and OPINION denying relief but granting a Certificate of Appealability as to the closing argument claim.

The Court of Appeals for the Third Circuit denied relief by Memorandum Opinion on January 24, 2006. A Petition for Rehearing was denied on June 28, 2006.

b. Statement of the Facts

INTRODUCTION

Petitioner was fifty-two years old at the time of this event. It is undisputed that the complainant, a resident of Kentucky, advertised on the Internet seeking a relationship with an older man and repeatedly represented herself to be

eighteen years of age. In addition to misleading petitioner via e-mail and telephone, she falsified a photo identification card to show herself to be eighteen [when she was fifteen]. Petitioner went to Kentucky, met her, and brought her back to his home in Pennsylvania, where he was subsequently arrested.

The defense was simple:

A. Petitioner did not know the complainant was underage;

B. It was her plan to have a relationship with an older man, both for her own fulfillment and to permit her to leave her adoptive parents' home, and she had to deceive an older man as to her true age to accomplish this; and

C. There was no sexual intercourse between the two.

MOTION *IN LIMINE*

Counsel for petitioner moved for the admission of evidence that, approximately one year prior to the incident with petitioner, the complainant had entered into a relationship with another older man and had misrepresented her true age to that person. Counsel never moved for the admission of this evidence under Pennsylvania's rape shield statute exceptions, and the trial court barred its use on rape shield grounds.

TRIAL TESTIMONY

Carrie Williams admitted to deceiving her parents and placing a "Yahoo" personal ad on the Internet in which she portrayed herself as a submissive eighteen year old seeking a master. She received a response from petitioner, and an exchange of further e-mails and telephone calls began. Much of the communication had to do with sexual

activity and involved role playing. Throughout the Internet and telephone relationship, Williams told petitioner that she was eighteen years old.

Ms. Williams and petitioner planned for petitioner to come to Kentucky, stay at a hotel, and see her in person. Williams met with petitioner on May 5th and the next morning, on her own initiative, sneaked out of her parents' home and contacted petitioner. At each encounter Williams said she was eighteen, swearing to it at least once, and provided a photocopy of an identification card that shows her to be eighteen years old.

Early on the morning of May 6, 2000, Carrie Williams' mother discovered that her daughter was missing from the family home in Kentucky. The parents found various items in their daughter's room, including a cut up piece of paper with a telephone number with area code "215."

Williams' father made efforts to locate his daughter. He ultimately met with police at the Fairfield Inn, where they examined registration cards and identified petitioner by name, based on the limited information they had. According to the father, petitioner's registration card had his correct 7-digit home telephone number but a false area code. No objection was made to this testimony, and no attempt was made to disprove it. Defense counsel had police reports showing that the hotel registration had an *accurate* telephone number and area code, *including a report with her father quoted as confirming this information.* As well, the prosecutor, possessing the police reports, never corrected this and instead exploited it in closing argument as proof of "deception" and consciousness of guilt.

Alexander and Williams drove to Pennsylvania. During the ride, there was sexual dialogue and sexual touching, and Williams drew several graphic pictures, at

her own initiative. The two arrived in Pennsylvania. *At trial*, Williams claimed that petitioner there engaged in various acts of sexual penetration, including fellatio, cunnilingus, and vaginal and anal intercourse. Williams also claimed that when she indicated to petitioner that he wasn't paying appropriate attention to her, he said "Of course I want you here, baby; I'm risking 25 years in jail to be with you." Williams ultimately fell asleep and was awakened by police coming to the house. Williams acknowledged that she told petitioner that she was a senior in high school and that she had been left back in school.

Cross-examination of Williams revealed the following:

1. Williams, interviewed by the F.B.I., never mentioned the alleged statement "Of course I want you here, baby; I'm risking 25 years in jail to be with you." Nor did she allege any sexual penetration of any kind.
2. At the hospital, she denied any anal or vaginal intercourse was even attempted.
3. At her treatment program in or around July 2000 she denied any vaginal or anal sex.
4. She only mentioned anal or vaginal intercourse as an allegation months later, when she was at the treatment facility and was asked to write a version of what allegedly happened.
5. Williams used a computer to alter her identification papers to make herself appear to be eighteen years old.
6. While in police custody, Williams wrote a list of questions, one of which asked whether she could be placed in foster care rather than be returned to her adoptive parents.

Critically, petitioner's counsel was precluded from establishing that Williams' Yahoo advertisement describes herself as "slightly experienced." [On this issue, the trial court conditioned admissibility on the jury being told that

the statement was "false." Defense counsel properly rejected this proposal.]

Examination of the prosecuting officer and introduction of "rape kit" records established that the results of all tests for sexual trace evidence are negative.

During closing argument, the prosecutor made the following statements:

> We heard Mr. Schneider [defense trial counsel] go on and on about her, and she's been dragged through the mud, she's been victimized by this man under the facts of this case, and they would like you to victimize her again.
>
> MR. SCHNEIDER: Objected to.
>
> THE COURT: It's argument.
>
> * * *
>
> He [petitioner] wanted her so bad that he put a fake or a false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to talk about deception? Look there, not to a 15 year old.

B. How the Federal Constitutional Questions Were Preserved

On direct appeal, new (instant) counsel raised all claims as federal constitutional claims, under the rubric of ineffective assistance of counsel. Separately, trial counsel did object to the prosecutor's "victimize her again" argument. The District Court determined that all of petitioner's claims have been properly exhausted.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DECIDE THAT THE DUE PROCESS CLAUSE IS VIOLATED BY AN UNMITIGATED PROSECUTORIAL CLOSING ARGUMENT, IN A CLOSELY CONTESTED SEXUAL ASSAULT CASE, THAT TELLS JURORS THAT THEIR VERDICT OF ACQUITTAL WILL REVICTIMIZE THE COMPLAINANT.

During closing argument, the prosecutor directly linked the jury's verdict of acquittal to a further victimization of a minor he contended had been anally and orally raped by petitioner:

> We heard Mr. Schneider [defense trial counsel] go on and on about her, and she's been dragged through the mud, she's been victimized by this man under the facts of this case, **and they would like you to victimize her again**.
>
> MR. SCHNEIDER: Objected to.
>
> THE COURT: It's argument.

(**bold** emphasis added). By failing to sustain the defense objection and by not giving any curative instruction, the trial court exacerbated the acknowledged prejudice of the improper argument. Because the evidence is far from overwhelming, there can be no confidence that the judgment was not affected by the unmitigated prejudice.

The controlling standard here is clear, and was set by this Court more than three decades ago. Prosecutorial misconduct may "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also*, *Berger v. United States*, 295 U.S. 78 (1935) (assessing whether the prosecutor struck a "foul blow"), overruled on other grounds, *Stirone v. United States*, 361 U.S. 212 (1960). Yet the deviation

from this rule of law, both in this case and as a national phenomenon, affirms the need for this Court to grant the writ and to establish conclusively that such unmitigated arguments violate Due Process. More particularly, the grant of *certiorari* is warranted both because of the recurring nature of this problem and because the Third Circuit's framework for its denial of relief was directly based on state court factual findings that clear and convincing evidence proves to be unreasonable determinations of the facts. Indeed, the Circuit's reliance on unreasonable fact findings is at the root of every aspect of its decision, and this Court should establish conclusively that such objectively unreasonable findings may not stand as the basis for denying habeas relief.

A. The National Phenomenon of Prosecutorial Misconduct During Closing Argument

It is indisputable that prosecutorial error, including closing argument error, has been a core factor in criminal trial reversals. As well, the tone and verbiage in such arguments has persisted, particularly in seeking to link jurors' verdicts [acquittals] and the problems of crime:

- "If you, based on the law and the facts of this case, choose not to execute the defendant, you have passively issued a warrant of execution for someone else." *Bates v. Bell*, 402 F.3d 635, 642 (6th Cir. 2005).
- "Ladies and gentlemen, you the jury, [assistant district attorney] Mrs. Smith and me, and the police, all fulfilled their roles in this case because that's our duty. . . . This defendant . . . committed a crime so vile, so vicious, so despicable, so unnecessary that the death penalty is the only answer. Sure your job is hard, but you can do it. Only you can

do it. The police department has done all that it can do. When I sit down, Mrs. Smith and I will have done all that we can do. Only the 12 of you can finish the job by going up in that jury room and bringing back a verdict of death. Unless you do that, the efforts of the police department and my office have all been in vain." *Cargle v. Mullin*, 317 F.3d 1196, 1222-23 (10th Cir. 2003).

- "The last thing I have to say is that if you don't believe [M.A.] and you think she's lying, then you've probably perpetrated a worse assault on her." *Moore v. Morton*, 255 F.3d 95, 101 (3rd Cir. 2001).
- "Now folks are we going to turn [Gall] loose on society by reason of insanity[?]" *Gall v. Parker*, 231 F.3d 265, 315 (6th Cir. 2000).
- "[C]ollectively you can go back there and stop [the defendants]. You can make sure that [the victim] isn't going to get beat up again. Heaven forbid, for the witnesses that came in this courtroom the last couple of days if these guys are found not guilty. Heaven forbid. Don't let that happen . . . " *United States v. Cunningham*, 54 F.3d 295, 300-01 (7th Cir. 1995).
- "[A] lot of people are interested in your decision. . . . Everyone in Saipan is interested. That's why there are so many people in the courtroom. The people want to know if they are going to be forced to live with a murderer . . . Your job is to worry about Mr. Mendiola. And when I say worry, I mean worry. Because that gun is still out there . . . Mr. Mendiola deserves to be punished for what he did and that's your decision. And it's important because, as I said, that gun is still out there. If you say not guilty, he walks out

right out the door, right behind you." *Commonwealth of Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992).

- "Now look at him. He doesn't look like a murderer and he's not charged with murder, but nobody looks like a murderer. It's an action you take and you don't feel – you are not supposed to feel sympathy for his family, for his grades going down the tube. You look at the facts. This kid brought a military rifle into your community to go to school with, to settle fights with. He wants you to excuse it, to believe his story and find that that's reasonable and give him the thumbs-up by writing not guilty. . . . Are you really willing to do that in today's day and age? A collective judicial endorsement that that is proper, bringing guns to school? Think long and hard about that. . . . Are you ready to write not guilty on that verdict slip to a man that buys a Russian military rifle and along with his baseball glove and his blue jeans and his school books brings it into your community as a guest going to school here, goes out to nightclubs and bars and parties, looks for fights and settles them with this? Are you willing to do that?" *Commonwealth v. Poplawski*, 852 A.2d 323, 328 (Pa. Super. Ct. 2004).[1]

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[1] Such 'blame the jury' argument also has been incorporated into cross-examination:

> When being questioned by Lowe [defense counsel] about various conditions that may be placed on sex offenders who are given probation, Dr. Cole opined that "there have been several . . . cases around the State where Judges will require a notice on [the sex offender's] door or a sign in the yard, something of that nature, again to warn the community." During cross-examination, the prosecutor asked Dr. Cole if he had "ever had a Judge that would require not only the sign be put out there but the names and addresses and phone numbers of the jury members that

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The prosecutor's argument here mirrors that condemned in *Moore* (where immediate and specific curative instructions were deemed inadequate to remedy the constitutional violation):

Argument in *Moore*	**Argument in *Alexander***
The last thing I have to say is that if you don't believe [M.A.] and you think she's lying, then you've probably perpetrated a worse assault on her.	We heard Mr. Schneider go on and on about her, and she's been dragged through the mud, she's been victimized by this man under the facts of this case, and they would like you to victimize her again.

B. The Third Circuit's Reliance on Unreasonable State Court Fact Findings

Petitioner defended against the charges by contending both that he did not know the true age of the complainant *and* that no sexual contact occurred;[2] both arguments have extremely strong record support. Nonetheless, the Third Circuit premised its denial of relief on the ground that the evidence of consensual sexual penetration was strong and "without contradiction" (as claimed by the state trial court):

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gave him probation" be placed on the sign. Before Dr. Cole could respond, Lowe interposed an objection, and the court asked the prosecutor to restate the question. The prosecutor then inquired whether, in cases where juries had recommended probation for sex offenders and probation was given, the judge had ordered that the "names of the jurors and their addresses and telephone numbers" be listed on the sign. *Ward v. Dretke*, 420 F.3d 479, 490 (5th Cir. 2005).

[2] This dual defense is not inconsistent. *See, e.g., Arcoren v. United States*, 929 F.2d 1235, 1245-46 (8th Cir. 1991), *cert. den.*, 502 U.S. 913 (1992).

> [a]ccording to the state trial court, the "evidence at trial revealed, without contradiction," that Alexander, 52, and Williams, 15, engaged in consensual sexual activity.

App. 5.[3] To the contrary, and indisputably, the evidence of sexual contact was contradicted by the complainant's own prior inconsistent and exculpatory statements and by the absence of any corroborating physical evidence, and was argued to the jury as not having been proved.

This flagrant misreading[4] of the record both stands as an independent ground for the grant of the writ and shows the Panel to be at variance with the objective standards of all other Circuits, which strongly credit the absence of corroborative evidence as indicating a close case when assessing instances of prosecutorial misconduct.

We start with the defense closing argument. Trial counsel emphasized across much of the closing argument that the jury should not (and properly could not) find that there was proof of any sexual penetration:

> What are the key issues in this case? What I like to say, where does the rubber meet the road? Well, did she deceive him about her age? **Did sexual intercourse occur in Pennsylvania? Did Ray do things that tended to corrupt her?** These are the key issues in the case . . .
>
> (Emphasis added).

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[3] *See also* App. 9 ("Even if it is assumed that Williams's father testified falsely and the prosecutor knew of the perjury and acted improperly . . . , Alexander – **for the reasons discussed above in relation to his "victimize her again" claim** – has not met his burden of showing prejudice."). (Emphasis added.)

[4] The state trial court also was objectively unreasonable when it contended that "the prosecutor's remarks were supported by the evidence . . . [and] contained inferences which were reasonably drawn from the evidence . . . " App. 131. Wisely, the federal courts rejected this contention as baseless.

. . .

This brings us to another issue. Did the sex even occur? Now, they've got to prove this to you, that certain sexual acts occurred in Pennsylvania here. You can certainly consider things that may have occurred elsewhere but did the sex acts occur? October 26, 2000 she wrote out a 13-page, single-spaced handwritten statement detailing oral and anal sex in very vivid description . . .

She was interviewed in July. She said it was only oral and digital, and she swore to those people I'm going to tell the truth. She was lying about that she was telling the truth because she didn't . . .

That night [the night of the arrest] she went to the hospital. She told the nurse in the presence of a police officer it was only oral, there was no anal even attempted. There was no vaginal even attempted. She told the police, Corporal Getter, and the FBI, we came back to the house. We ate. He got sick. We sat on the couch. We tried to make love. We fondled. He couldn't achieve an erection.

What is the Commonwealth really asking you to do here? Sort through the lies. Sort through the lies and pick a half truth.

I hope I'm making my point. Because the evidence in this case has shown that Ray was deceived, he was lied to, he was manipulated. **These people have not proven that he is a child molester**, he is a corrupter of minors, or that he interfered with anyone's custody.

(Emphasis added).

The closing argument has substantial record support:

1. In her initial F.B.I. interview Williams denied any sexual penetration, and at the hospital she denied

any anal or vaginal intercourse was even attempted. The F.B.I. interview also is exculpatory on petitioner's alleged knowledge of her true age.[5]

2. At her treatment program in or around July 2000 she again denied any vaginal or anal sex.
3. She only mentioned anal or vaginal intercourse as an allegation months later, when she was at the treatment facility and was asked to write a version of what allegedly happened. The circumstances of this last statement raise substantial questions about its reliability.[6]
4. As well, examination of the prosecuting officer and introduction of "rape kit" records established that the results of all tests for sexual trace evidence are negative.

These clear and convincing record facts conclusively establish two points. First, the factual determination that the proof of consensual sexual contact was "without contradiction" is unreasonable, by clear and convincing evidence. Second, the Third Circuit's decision flowed directly[7] from the objectively unreasonable determination

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[5] The reliability of Williams' initial F.B.I. statement, in which all sexual penetration and petitioner's alleged knowledge of her true age were denied, cannot be ignored. *See Idaho v. Wright*, 497 U.S. 805, 820 (1990) (listing the factors that generally assure reliability, including spontaneity and consistent repetition, and holding that the " 'medical treatment' exception[ ] to the hearsay rule [is] based on the belief that persons making such statements are highly unlikely to lie").

[6] Although the state trial court contended that the complainant's testimony was substantiated by evidence obtained from a search of petitioner's home, in fact no physical evidence corroborated the claim of sexual penetration. Additionally, as is detailed in Argument II., *infra*, petitioner was precluded from testing the reliability of the treatment center written statement, which is itself a critical factor in assessing harm.

[7] That the Circuit separately noted the existence of evidence suggesting that petitioner "knew or suspected" that the complainant was underage, App. 6, is of no moment. Such evidence in no way

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that because the complainant's testimony was uncontradicted, the evidence against petitioner is sufficiently strong to outweigh the unmitigated prejudice of the prosecutor's comment. Thus, the Circuit rendered a "decision based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), and AEDPA should pose no bar to habeas relief for petitioner. *Miller-El v. Dretke*, ___ U.S. ___, 125 S.Ct. 2317, 2339 (2005); *Wiggins v. Smith*, 539 U.S. 510, 529 (2003).

AEDPA imputes a presumption of correctness to state court fact findings with record support. 28 U.S.C. § 2254(e). Here, by contrast, the federal courts have adopted erroneous state court fact findings with *no* record support as the basis for denying habeas relief. Separately, the Third Circuit's analytical approach is diametrically opposed to that of the Sixth Circuit, which recognizes that a heightened scrutiny applies to instances of prosecutorial misconduct in the *highly emotional context* of sexual assault cases when, as here, there is no corroborating evidence and the issue of credibility is paramount:

> Cases involving sexual abuse exert an almost irresistible pressure on the emotions of the bench and bar alike. Because such cases typically turn on the relative credibilities of the defendant and the prosecuting witness, however, a strict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial.

Martin v. Parker, 11 F.3d 613, 616-17 (6th Cir. 1993); *see also*, *Hodge v. Hurley*, 426 F.3d 368, 377 (6th Cir. 2005)

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addresses whether there was sexual contact, which must be the linchpin of any valid, objective determination of harmlessness.

(same); *Washington v. Hofbauer*, 228 F.3d 689, 709 (6th Cir. 2000) ("In a close credibility contest such as this, with horrible acts alleged but scant hard evidence for the jury to weigh, a prosecutor must be doubly careful to stay within the bounds of proper conduct.").

Because of the persistent problem of unmitigated prosecutorial arguments telling jurors that their acquittals will be responsible for further crimes and the victimization of complainants, and because of the blatantly erroneous factual and analytical frameworks relied upon by the Court of Appeals, the writ should issue as to this claim.

II. THE RIGHT TO PRESENT A DEFENSE, AS AFFIRMED IN *HOLMES V. SOUTH CAROLINA*, AND ITS CORRELATE RIGHT TO CONFRONT WITNESSES, ENTITLE A DEFENDANT PURSUING THE AFFIRMATIVE DEFENSE OF MISTAKE OF AGE TO PRESENT TO THE JURY THE EVIDENCE RELIED UPON, TO WIT, THE VERY WORDS AND DEEDS OF THE COMPLAINANT THAT ESTABLISH THAT DEFENSE, IN PARTICULAR HER SELF-DEPICTION AS A "SLIGHTLY EXPERIENCED" EIGHTEEN YEAR OLD.

In *Holmes v. South Carolina*, ___ U.S. ___, 126 S.Ct. 1727, 1732 (2006), this Court unanimously emphasized that the "Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote . . . " Petitioner seeks a determination by this Court that, when the affirmative defense of mistake of age is present, the "exclusion" of competent, relevant evidence proving the affirmative defense (*i.e.*, the complainant's own words that form the basis for the defense) "serve[s] no legitimate purpose or [is] disproportionate . . . " This is true

in this case because the exclusion of "competent, reliable evidence" deprived petitioner of the right to "have the prosecutor's case encounter and 'survive' the crucible of meaningful adversarial testing.'" *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *cf.*, *Rock v. Arkansas*, 483 U.S. 44 (1987).

Petitioner's claim is both simple and compelling. He was told by the complainant in her Internet self-promotion that she was eighteen years old and "slightly experienced"; and in subsequent communications she reported to him her prior relationship with another older man (information that would further confirm a reasonable belief as to her adulthood).

That she did so is indisputable – the copy of the Internet ad exists; the words are admittedly those of the complainant; and it is the *fact* of utterance that gives them weight, because the affirmative defense of mistake of age derives from the information purposely provided by the complainant and relied upon by the accused.[8]

Indeed, to the extent that reliability is the *sine qua non* of the Due Process right to present affirmative defense evidence (and to effective cross-examination), the proof excluded here is *more* reliable than that in *Holmes*. There, the defense sought to prove that a third party had made admissions to committing the crime Holmes was accused of, even though the circumstances in which those admissions occurred did not confer any particular *indicia*[9] of reliability. Rather, they were statements made to cronies

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[8] The District Court (App. 34 n. 11) acknowledges that "evidence about the extent to which Williams deceived Alexander is relevant to negate *mens rea* . . ."

[9] Compare, Rule 804(b)(4), Fed.R.Evid., allowing declarations against penal interest to be admitted only when "corroborating circumstances clearly indicate the trustworthiness of the statement."

or, in one instance, another inmate. 126 S.Ct. at 1730. Here, by contrast, the reliability is proved by the fact that the words were uttered; for, true or not, they informed petitioner's state of mind and thus established his defense.[10] The unconstitutionality of the exclusion in *Holmes* makes clear the invalidity of the exclusion here.[11]

No court to date has proffered a legitimate or proportionate ground to justify the exclusion of the evidence required to meet the affirmative defense.[12] The trial court conditioned admissibility of the "slightly experienced"

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[10] Exclusion of the complainant's statements about the prior relationship also deprived petitioner of the right to present a defense (and to effective cross-examination) by preventing him from showing her conflation of the events of the earlier engagement with events she claimed petitioner was present at or engaged in. The complainant proved the conflation by averring, in her written statement at the treatment center, that she met petitioner in February, which is an impossibility, since her Internet ad was not placed until March 21, 2000. [She did physically meet adult M.A. during the month of February; she did not physically meet petitioner until May.] She also reversed her ages when describing occurrences from the two different relationships. These statements prove that she directly commingled and confused the prior relationship with the incident with petitioner and would explain her mistaken attribution to him of sexual acts and the "risking 25 years" statement when those incidents are from the prior adult relationship. Just as an accused is entitled to prove an alternative source for any physical evidence, so too must petitioner have the same entitlement to show an alternative source for the testimonial evidence.

[11] Clearly, had the complainant made *no* statements claiming to be eighteen or otherwise "experienced," the prosecution could have proved this to show an awareness of her age. *Holmes* requires an equal playing field – just as evidence of guilt must be admitted, so too must proof in the same category be admissible when it is supportive of the defense. 126 S.Ct. at 1734-35.

[12] Although rape shield laws may properly lead to the preclusion of general character evidence, they may not stand as bars to evidence core to the defense, as happened here. By improperly overextending the rape shield laws, the trial court violated petitioner's confrontation and compulsory process rights. *Crane v. Kentucky*, *supra*; *cf.*, *Holmes*, *supra*.

evidence on the jury being told an untruth, that the words "slightly experienced" were false.[13] Yet this ruling rendered the evidence nugatory. Misleading the jurors by telling them that the self-depiction was false would have unfairly offset the evidence by implying to jurors that, since it was false (*which it is not*), petitioner should have been more likely to know she was underage, a ruling that undercuts if not negates the affirmative defense of mistake of age. The compromise was also flawed for improperly asserting her chastity when such proof is inadmissible.

As to the evidence of the prior relationship, the trial court addressed this issue only as to whether such evidence establishes the complainant's bias to falsely accuse petitioner and her plan. The Pennsylvania courts never considered or addressed conflation and faulty memory or the significance of this evidence to the affirmative defense of mistake of age. The District Court's analysis largely tracks that of the Pennsylvania courts.

The Court of Appeals' analysis does not meet the *Holmes* standard for assessing this proof. Rather, the Panel denied a Certificate of Appealability[14] for this claim in large part based on the factual error detailed above, *i.e.*, since the *actus reus* of physical contact was undisputed or otherwise

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[13] The trial court's *post hoc* contention that " . . . any statements that C.W. made concerning her level of sexual experience on the internet [sic] were properly precluded as irrelevant . . . " App. 125, is contrary to settled law. *Doe v. United States*, 666 F.2d 43, 48 (4th Cir. 1981); *United States v. Stamper*, 766 F.Supp. 1396, 1400 (W.D.N.C. 1990) (affirmed without opinion by *In re One Female Juvenile Victim*, 959 F.2d 231 (4th Cir. 1992)); *Commonwealth v. Killen*, 545 Pa. 127, 680 A.2d 851, 853-54 (1996); *Commonwealth v. Reed*, 644 A.2d 1223, 1231 (Pa. Super. Ct. 1994).

[14] The error in denying a certificate of appealability on this and related claims is detailed in Argument IV., *infra*.

compelling, the harm of any error was constitutionally insignificant.

Neither the principle of *Holmes*, a continuation of nearly forty years of precedent recognizing the right to present core defense evidence originating with *Washington v. Texas*, 388 U.S. 14 (1967), nor any other of this Court's cases, has ever been applied to excluded evidence critical to establishing an affirmative defense.[15] Thus, this is a question of first impression, and the Third Circuit should have issued the certificate for this reason alone.

Petitioner seeks no new exception to any exclusionary rule but only the reinforcement and application of this Court's existing precedents.[16] Because of the significance of this claim to petitioner's own cause, and because of the need to clarify *Holmes* and the interplay of the Due Process and Confrontation rights in contexts where state

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[15] *But see McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, J., dissenting) ("surely the Constitution also requires States to allow consideration of all evidence bearing upon the substantive criminal offense and consideration of all evidence bearing upon affirmative defenses").

[16] The prior relationship evidence is admissible, under this Court's precedents, for three distinct but interrelated reasons:

- To prove faulty memory and conflation, facts critical to assessing witness credibility. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987) ("the right to cross-examine includes the opportunity to show that . . . the testimony is exaggerated or unbelievable").
- To present to the jury the evidence relied upon and required to meet petitioner's affirmative defense burden of proof. *United States v. Scheffer*, 523 U.S. 303, 315 (1998) (noting as unconstitutional "[t]he exclusion[ ] of evidence that . . . significantly undermined fundamental elements of the accused's defense").
- To demonstrate the complainant's plan to leave her parents custody and control, and thus her motive to fabricate. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988).

exclusionary rules might be seen as providing an ostensibly legitimate purpose for barring evidence that goes directly to an affirmative defense[17] (or for preventing effective cross-examination), the writ should issue on this claim.

III. THE DUE PROCESS AND RIGHT TO COUNSEL GUARANTEES ENSURE A CRIMINAL ACCUSED THE RIGHT TO PREVENT TRIAL BY, AND TO RESPOND TO, FALSE EVIDENCE.

The prosecution in petitioner's trial, in possession of police records showing conclusively that petitioner had honestly and accurately given his correct telephone number when registering at a hotel in Kentucky,[18] knowingly adduced testimony to the contrary, left it uncorrected, and then argued the false testimony as proof of petitioner's

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[17] In *Dixon v. United States*, ___ U.S. ___, 126 S.Ct. 2437 (2006), this Court again upheld the assigning of the burden of proof to the accused in affirmative defense cases. The corollary of that holding is equally clear – where the state places that burden on the accused, it may not concomitantly preclude him from presenting reliable proof to meet that burden. *Cf.*, *McKelvey v. United States*, 260 U.S. 353, 357 (1922) ("an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause . . . and [] *it is incumbent on one who relies on such an exception to set it up and establish it*") (emphasis added).

[18] The May 6 report of the chief investigating officer makes this explicit:

> Chief Jesse [of the local police in Kentucky] had subsequently contacted the Fairfield Inn and made inquiries regarding any guests from the Philadelphia area using the name "Ray" and having a phone number beginning with 215. The hotel had only one guest which fit the information provided. His name was Raymond Alexander and he had used the phone number 215-794-7203 on his registration card . . .

guilt. Such conduct stands in direct contravention of decades of this Court's Due Process jurisprudence.

> A long series of decisions in this Court . . . established the proposition that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."

Donnelly v. DeChristoforo, 416 U.S. at 644-46; *see also United States v. Bagley*, 473 U.S. 677, 679 n.8 (1985) (condemning the "knowing use" of perjured testimony).

As the Court reaffirmed in *Kyles v. Whitley*, 514 U.S. 419, 433 n.7 (1995) (*quoting United States v. Agurs*, 427 U.S. 97, 103 (1976)):

> "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

The same is true when the government, although not soliciting false evidence, allows it to go uncorrected when it appears at trial. *Giglio v. United States*, 405 U.S. 150, 153 (1972).

Here, *in a case that could only be decided based on the competing credibilities*, petitioner was falsely portrayed as a deceptive individual who disguised his movements because he knew the complainant to be underage. Critical to this depiction was false testimony knowingly adduced by the prosecution, unrebutted by the defense, and argued to the jury as core to the claim of guilt – that petitioner used a fake area code when registering at a hotel in Kentucky:

> He wanted her so bad that he put a fake or a false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to

> talk about deception? Look there, not to a 15 year old.

Thus, the prosecutor not only used the false testimony to attack the credibility of petitioner's core defense, but also to bolster the complainant's demonstrably questionable credibility.

Unknown to the jury, in the hands of both the prosecution and trial counsel were a series of police reports confirming that petitioner had used his correct area code at the hotel. The prosecutor left them out of the record, defense counsel neither sought their admission nor used them to impeach the complainant's father (who was quoted in one report as confirming the correct area code), and the false[19] contention became a critical part of the proof of *mens rea*.[20]

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[19] The District Court responded to this claim by noting that it cannot be said with certainty that the father's testimony was false because the police officer could have written the report inaccurately. App. 42. This analysis is wrong. Two contemporaneous police reports show irrefutably that petitioner used the correct phone number, and one includes this assertion being made by the father. Given these facts (and the absence of any fact supporting the District Court's speculative hypothesis), there is no basis for accepting the father's unsubstantiated belated memory as accurate. More importantly, however, the COA on this issue was not denied for this reason, but because of the erroneous conclusion that the fact of sexual penetration was "without contradiction," thus outweighing the demonstrated prejudice, an example of the Circuit's systemic reliance on mistaken state court fact findings.

[20] The connection between the misconduct and the core of petitioner's affirmative defense makes the harm more substantial. *Zappulla v. New York*, 391 F.3d 462, 472 (2nd Cir. 2004); *Davis v. Zant*, 36 F.3d 1538, 1550 n.17 (11th Cir. 1994) ("[p]rosecutorial misconduct is least acceptable under the Constitution when aimed the core of the defense's case."). The admonitions of *Martin v. Parker*, *supra*, also apply here.

Petitioner's claim here is one part prosecutorial misconduct, one part ineffective assistance of counsel (for counsel's dereliction in failing to present the police witness and records to demonstrate conclusively the falsity of the prosecution witness' testimony), and the cumulative and synergistic effects of that combination in a case that could only be decided on competing credibilities. In either light, the Constitution was violated. Again, the Third Circuit's analysis relies primarily on the unreasonable state court fact findings, and is thus itself objectively unreasonable.

Both because of the harm to petitioner's cause, and because of the recurring nature of prosecutorial misconduct in relying on false or misleading testimony to bolster weak cases, *see, e.g.*, Liebman, *et al.*, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1975 (documenting prosecutorial suppression of evidence as one of the two major causes of reversals in capital trials), the writ should issue as to this claim.

IV. PETITIONER IS ENTITLED TO THE GRANT OF A COA, OR REMAND TO THE COURT OF APPEALS, AS THAT COURT PREMISED ITS DENIAL OF A CERTIFICATE ON A CLEARLY ERRONEOUS PRESUMPTION OF CORRECTNESS FOR STATE COURT FACT FINDINGS THAT ARE PROVED TO BE UNREASONABLE BY CLEAR AND CONVINCING RECORD EVIDENCE, AND BECAUSE PETITIONER OTHERWISE PROVED THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S ASSESSMENTS OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court reminded the Courts of Appeals that the standard

for issuance of a certificate of appealability (COA) is a relatively modest one: all that is required is that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 537 U.S. at 338. Petitioner seeks review by this Court of two interwoven claims:

- Whether, when a court of appeals premises its denial of a COA on unreasonable state court fact findings, any such denial of a COA can be valid?; and
- Whether reasonable jurists could "find the district court's assessment of the constitutional claims debatable or wrong" regarding the right to confront witnesses, the right to present proof core to an affirmative defense, the right to the effective assistance of counsel, and the false evidence claims?

As detailed above, petitioner defended aggressively by claiming that there was no proof of sexual penetration, a defense with strong record support[21] and with *no* physical evidence to the contrary. Nonetheless, the Court of Appeals denied the certificate, primarily because, in its view,

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[21] In her initial F.B.I. interview Williams denied any sexual penetration, and at the hospital, she denied any anal or vaginal intercourse was even attempted. That F.B.I. interview also is exculpatory on petitioner's alleged knowledge of her true age. At her treatment program in or around July 2000 she again denied any vaginal or anal sex. She only mentioned anal or vaginal intercourse as an allegation months later, when she was at the treatment facility and was asked to write a version of what allegedly happened. As well, examination of the prosecuting officer and introduction of "rape kit" records established that the results of all tests for sexual trace evidence are negative.

The federal courts have consistently ignored this significant contradictory evidence. This Court has found courts that ignore significant evidence to be unreasonable. *Miller-El v. Cockrell*, 537 U.S. at 345.

proof of sexual penetration was "without contradiction" (based upon the trial court's unreasonable fact findings). The Third Circuit unreasonably premised its holdings (both that denying relief on the issue on which a COA was granted and that denying a COA on petitioner's remaining claims) on a finding that:

> [a]ccording to the state trial court, the "evidence at trial revealed, without contradiction," that Alexander, 52, and Williams, 15, engaged in consensual sexual activity.

App. 5.[22]

In seeking *certiorari*, petitioner asks this Court to hold that a decision to deny a COA can never be valid where, as here, the decision flows directly from demonstrably unreasonable state court fact findings that were the primary basis relied upon to determine two critical factors (*i.e.*, the weight of the evidence and a resulting assessment of harmlessness). Separately, and as detailed in Arguments II. and III., *supra*, the remaining claims on which petitioner sought the COA are neither frivolous nor asserted merely in good faith. *See Miller-El v. Cockrell*, 537 U.S. at 337 ("A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part") (internal quotations omitted).

Indeed, an assessment of each claim *in light of the facts as proved at trial* confirms that reasonable jurists could differ with the District Court's determination of the

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[22] *See also* App. 9 ("Even if it is assumed that Williams's father testified falsely and the prosecutor knew of the perjury and acted improperly . . . , Alexander – **for the reasons discussed above in relation to his "victimize her again" claim** – has not met his burden of showing prejudice.") (Emphasis added.)

false evidence claim. Use of false evidence to secure a conviction (and the correlate claim of counsel's ineffectiveness in not correcting such evidence) clearly raises more than a frivolous contention in a case where credibility was the key issue and no physical evidence corroborates the complainant's belated accusations. *Cf.*, *Banks v. Dretke*, 540 U.S. 668, 698-99 (2004) (finding withheld evidence "material" if that "evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict . . . "). More importantly, the District Court's assessment of this claim is debatable precisely because of its reliance on the unreasonable factual findings to declare any error harmless, when in fact the false testimony provided the only independent attack on the credibility of petitioner's core defense.

The confrontation and compulsory process violations are equally compelling, as exclusion of the "slightly experienced" and other affair evidence deprived petitioner of core affirmative defense evidence and effective cross-examination in a case where credibility was core, thus running afoul of this Court's precedents in *Davis v. Alaska*, 415 U.S. 308, 316 (1974) and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Indeed, analysis of the five-prong test of *Van Arsdall*, "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case[,]" 475 U.S. at 686-87, shows all five factors strongly support petitioner: the witness was at the core of the prosecution, the excluded testimony (supporting both the affirmative

defense and proof of conflation) was in no way cumulative but instead essential to the defense burden of proof, the witness' testimony was largely uncorroborated and was contradicted by her own inconsistent prior statements, cross-examination was denied on these critical credibility and reliability issues, and the strength of the prosecution's case is questionable because of the complainant's changes of stories and the lack of corroboration.[23] The District Court's reliance on *Davis v. Alaska* to deny petitioner's confrontation claim is certainly debatable, given that this Court held that Alaska's competing interest did not outweigh Davis' confrontation rights.

In *Miller-El v. Cockrell*, the Court of Appeals decided the merits before deciding the threshold question of whether the issue presented was debatable; here, the Court of Appeals based its analytical framework on state court factual findings that have been shown by clear and convincing evidence to be unreasonable (*i.e.*, that the evidence is overwhelming because the complainant's testimony was uncontradicted and because physical evidence corroborates her testimony). Neither procedure complies with *Miller-El v. Cockrell* or AEDPA; and just as this Court granted *certiorari* in *Miller-El v. Cockrell* to ensure the correct application of AEDPA principles and practice, so too should it here.

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[23] The Third Circuit's analysis ignores the lack of corroborating evidence and the presence of contradicting evidence. That analysis also unreasonably relies on the same mistaken fact findings regarding the weight of the evidence. The District Court did not analyze these factors.

CONCLUSION

This Court has yet to address the Due Process implications of and limitations on the recurring practice of prosecutors telling jurors, via unmitigated closing argument, that their verdict of acquittal equates with an attack on the complainant/victim or the commission of further crimes by the jury. It also has not been called upon to apply *Holmes v. South Carolina* and the right to present a defense to excluded evidence at the core of a defendant's affirmative defense. Finally, the question of whether federal reviewing courts' decisions that are based directly upon unreasonable state court fact findings may be upheld deserves this Court's attention. [Here, those unreasonable fact findings undermine every decision subsequently rendered.] Petitioner's case presents all of these claims and more.

WHEREFORE, petitioner requests this Court to grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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RAYMOND ALEXANDER, Appellant v. ROBERT SHANNON, SUPERINTENDENT; THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

No. 05-1651

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

163 Fed. Appx. 167; 2006 U.S. App. LEXIS 1907

November 15, 2005, Argued
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COUNSEL: Jules Epstein, Esq. (Argued), Kairys, Rudovsky, Epstein & Messing, Philadelphia, PA, Counsel for Appellant.

Stephen B. Harris, Esq. (Argued), T. Gary Gambardella, Esq., Office of District Attorney, Doylestown, PA. Counsel for Appellees.

JUDGES: Before: ROTH, FUENTES, AND BECKER, Circuit Judges.

OPINION BY: BECKER

OPINION: BECKER, Circuit Judge.

Raymond Alexander appeals from an order of the United States District Court for the Eastern District of Pennsylvania denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We will affirm.

As we write essentially for the parties, we need not describe the facts of this case in detail. Briefly, Alexander was convicted by a jury in Bucks County, Pennsylvania of statutory sexual assault, involuntary deviate sexual

intercourse, and corrupting the morals of a minor. The offenses were related to his sexual encounters with a 15 year old girl, Carrie Williams. After Alexander's conviction was affirmed on direct appeal, he filed a petition for a writ of habeas corpus pursuant to § 2254. The District Court denied the habeas petition, but issued a certificate of appealability ("COA") on Alexander's claim that he was denied due process by the prosecutor's statement in closing that the defense "would like you to victimize [Williams] again." The District Court denied a COA on Alexander's remaining claims, namely, that the prosecutor presented false testimony, that the trial court improperly excluded certain exculpatory evidence, that his trial attorney provided ineffective assistance, and that the alleged errors, when combined, denied him a fundamentally fair trial. Alexander timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. As to the issue on which the District Court granted a COA, this Court exercises plenary review because the District Court relied exclusively on the state court record and did not hold an evidentiary hearing. *See Jacobs v. Horn*, 395 F.3d 92, 99 (3d Cir. 2005). A federal court may grant relief to a habeas petitioner "with respect to any claim that was adjudicated on the merits in State court proceedings," only if the state's adjudication of the claim was either "contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Alexander argues that the prosecutor's comments in his closing to the jury violated his due process right to a

fair trial. During closing argument, the following exchange took place:

> [Prosecutor]: We heard Mr. Schneider [defense counsel] go on and on about [Williams], and she's been dragged through the mud, she's been victimized by this man under the facts of this case, and they would like you to victimize her again.
>
> Mr. Schneider: Objected to.
>
> The Court: It's argument.

The Pennsylvania Superior Court concluded that Alexander failed to demonstrate that the prosecutor's remarks had the "unavoidable effect of, [sic] forming in the jury's mind a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." In particular, the Superior Court concluded that the prosecutor's statements did not necessarily liken an acquittal to the revictimization of Williams because the comments were subject to more than one interpretation.

Alexander argues that this analysis was an unreasonable application of clearly established federal law explicated in *Moore v. Morton*, 255 F.3d 95, 108 (3d Cir. 2001), a habeas case involving prosecutorial misconduct in a rape trial.[1] In *Moore*, this Court remanded with directions to

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[1] "In determining whether a state decision is an unreasonable application of Supreme Court precedent, this court has taken the view that 'decisions of federal courts below the level of the United States Supreme Court may be helpful to us in ascertaining the reasonableness of state courts' application of clearly established United States Supreme Court precedent.'" *Fischetti v. Johnson*, 384 F.3d 140, 149 (3d Cir.2004) (quoting *Marshall v. Hendricks*, 307 F.3d 36 at 51).

grant a writ of habeas corpus, having found that, despite the trial court's curative instructions, the evidence was not strong enough to ensure that the jury disregarded the prosecutor's inflammatory and highly prejudicial remarks during closing argument. *Id.* at 120. Those remarks included the prosecutor's statement that "the last thing I have to say is that if you don't believe [the victim] and you think she's lying, then you're probably perpetrating a worse assault on her." Alexander argues that the "perpetrating a worse assault" statement is "virtually mirrored" by the prosecutor's "victimize her again" comment in his case.

The District Court granted a COA on this issue, finding "Alexander's reliance on *Moore* . . . entirely legitimate" because "the words of both prosecutors – Alexander's and Moore's – do bear some resemblance." The District Court ultimately concluded, however, that "close scrutiny reveals material differences." We agree.

The Supreme Court has established that the inquiry on federal habeas review when analyzing a state prosecutor's comments to the jury is whether the comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); *see also Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). To evaluate whether a defendant was denied due process, a court must examine the prosecutor's comments in the context of the trial as a whole. *See Greer*, 483 U.S. at 766 (determining whether "remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's due process rights") (citing *Donnelly*, 416

U.S. at 639). We have explained that, under Supreme Court precedent, a "reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." *Moore*, 255 F.3d at 107.

Most importantly here, the evidence against Alexander is strong. *See Darden*, 477 U.S. at 182 (finding that habeas petitioner's trial was not fundamentally unfair because, inter alia, "[t]he weight of the evidence against petitioner was heavy"); *Marshall v. Hendricks*, 307 F.3d 36, 50 (3d Cir. 2002) (recognizing "that the stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker.").

According to the state trial court, the "evidence at trial revealed, without contradiction," that Alexander, 52, and Williams, 15, engaged in consensual sexual activity: "Shortly after arriving at [Alexander's] house . . . [Alexander] and [Williams] proceeded to the bedroom where [Alexander] performed oral sex on [Williams]. The two later engaged in anal sex." In addition, Williams testified that Alexander "rubbed her anus with his fingers," that she performed fellatio on Alexander, and that Alexander "put his penis inside of [her] vagina." This evidence provided the jury an ample basis upon which to find that Alexander was guilty of statutory sexual assault[2],

[2] Statutory sexual assault occurs when one (1) engages in "sexual intercourse" (2) with a complainant under sixteen (3) if the culprit is four or more years older than the complainant. *See* 18 Pa.C.S.A. § 3122.1. In addition to the "ordinary meaning" of the term, "sexual

(Continued on following page)

IDSI,[3] and corrupting the morals of a minor.[4] As a defense, Alexander argued that Williams deceived him about her age. *See* 18 Pa.C.S.A. § 3102 (providing that "when criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age"). Although Williams admitted that she attempted to pass herself off as 18 years old, there was strong evidence suggesting that Alexander knew or suspected that Williams was under 16.[5]

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intercourse" "includes intercourse per os or per anus, with some penetration however slight; emission is not required." *Id.* at 3101.

[3] One commits involuntary deviate sexual intercourse when one (1) engages in "deviate sexual intercourse" with another person (2) under sixteen (3) if the culprit is four or more years older than the complainant and (4) they are unmarried. *See* 18 Pa.C.S.A. § 3123(a)(7). Deviate sexual intercourse includes "sexual intercourse per os or per anus between human beings." *See* 18 Pa. C.S.A. § 3102 (providing that "when criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age"). Although Williams admitted that she attempted to pass herself off as 18 years old, there was strong evidence suggesting that Alexander knew or suspected that Williams was under 16.5. In addition, the prosecutor's "victimize her again" comment is less severe than the "perpetrating a worse assault" remark found improper in Moore. In Moore, the remark was directed to the credibility of the victim ("if you don't believe [the victim] and you between human beings." *Id.* at 3101.

[4] Corrupting the morals of a minor occurs when (1) one over eighteen (2) "by any act corrupts or tends to corrupt the morals" (3) of any minor under eighteen. *See* 18 Pa.C.S.A. § 6301(a).

[5] For example, Williams apparently told Alexander that she was a high school student who lived at home with her parents, and Alexander repeatedly requested proof of Williams's age; Alexander demanded that Williams call him "Daddy" and he liked her to say she was a virgin; and

(Continued on following page)

In addition, the prosecutor's "victimize her again" comment is less severe than the "perpetrating a worse assault" remark found improper in *Moore*. In *Moore*, the remark was directed to the credibility of the victim ("if you don't believe [the victim] and you think she's lying"). It also implied that an acquittal is tantamount to an offense more heinous than the brutal rape that Moore was charged with committing ("then you're probably perpetrating a worse assault on her"). In this case, the prosecutor first properly focused the jurors' attention on the evidence, noting that Williams had "been victimized by this man under the facts of this case." While the following phrase – "and they would like you to victimize her again" – clearly appealed to the jurors' emotions, it did so in the context of a case where the sex was factually, but not legally, consensual. The suggested "vicitmization," therefore, carried less emotional weight than the "perpetration" threatened in *Moore*.[6] Moreover, the remarks of the prosecutor in this

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Alexander usually referred to Williams as "baby" or "little girl." In addition, after their first sexual encounter in Alexander's home, Williams said she "didn't feel like he wanted me there; like he didn't want to be with me." Alexander replied, "Of course I want you here, baby. I'm risking 25 years in jail to be with you." Furthermore, during a telephone conversation, Alexander pretended to be a principal and Williams played a student sent for discipline. Finally, the jury could have inferred that Alexander feared that Williams was underage based on her testimony that he (1) stopped driving only twice during their trip from Kentucky to Pennsylvania, and that she did not get out of the car; (2) "seemed kind of nervous about [her] being" at the window of his home where she presumably could be seen by neighbors; and (3) vomited following one of their sexual encounters, and appeared "not too good, cold sweat, he looked sick."

[6] The Commonwealth attempts to minimize the severity of the prosecutor's comment by arguing that the reference to "victimization" was directed at defense counsel's "callous disregard" for the victim during cross-examination, rather than at the actions of Alexander. We

(Continued on following page)

case did not "implicate . . . specific rights of the accused such as the right to counsel or the right to remain silent." *Darden*, 477 U.S. at 182; *see also Donnelly*, 416 U.S. at 643 (noting that the case was not one "in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination").

We recognize that no specific curative instructions were sought or provided. *See Donnelly*, 416 U.S. at 643-44 (relying in part on trial court's specific curative instructions to deny habeas relief on claim related to prosecutor's comments); *Darden*, 477 U.S. at 182 (same); *Greer*, 483 U.S. at 766 & n. 8 (same). Nevertheless, we conclude that the strength of the evidence against Alexander supports the state court's conclusion – under a reasonable application of Supreme Court precedent – that Alexander's trial was not so infected with unfairness that it was constitutionally infirm.

With respect to Alexander's appeal from the District Court's denial of his remaining claims, the appeal may not proceed unless we first issue a COA. 28 U.S.C. § 2253(c)(1). A COA may issue only if Alexander has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Alexander must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

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find this argument unpersuasive. Although the prosecutor's remarks do include an attack on defense counsel's treatment of Williams, the "victimize her again" comment, which immediately followed "she's been victimized by this man," was likely perceived by the jury to be directed at Alexander.

Alexander argues that the prosecutor committed misconduct when he presented and did not correct false evidence suggesting that Alexander had purposefully provided a false area code on a registration card at a hotel where he stayed when visiting Williams at her home in Kentucky. Apparently, Alexander's correct phone number began with a 215 area code. A police report, which was provided to Alexander's attorney in discovery, indicated that Alexander registered at the hotel using a 215 area code. However, when Williams's father was asked on direct examination by the prosecutor, "the registration card at the hotel, did that have a 215 area code on it?," he replied, "no, it did not." In his closing argument, the prosecutor referred to the testimony of Williams's father: "[Alexander] wanted her so bad that he put a fake or false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to talk about deception? Look there, not to a 15 year old."

Even if it is assumed that Williams's father testified falsely and that the prosecutor knew of the perjury and acted improperly by not correcting it and by referring to it in closing, Alexander – for the reasons discussed above in relation to his "victimize her again" claim – has not met his burden of showing prejudice. Indeed, given the entirety of the evidence against Alexander, he has not shown "any reasonable likelihood" that the alleged error affected the jury's judgment. *See United States v. Biberfeld*, 957 F.2d 98, 105 (3d Cir.1992).

Alexander also argues that his attorney was ineffective because he failed to impeach Williams's father with the contradictory police report or to raise any objection to the prosecutor's statement during closing argument that Alexander "put a fake or false area code on the registration

at the hotel so hopefully he couldn't be traced." Trial counsel has an obligation to "investigate possible methods for impeaching a prosecution witness, and [the] failure to do so may constitute ineffective assistance of counsel." *Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003). Here, the police report could have been used to impeach Williams's father. However, her father's recollection of the area code on the hotel registration card had little direct bearing on whether Alexander was guilty. Rather, it was used by the prosecution to rebut Alexander's mistake of age defense. However, because there was significant additional evidence that Alexander knew Williams was underage, *see* footnote 5, *supra*, the failure to impeach Williams's father concerning the area code had little prejudicial effect. *Cf. Felder v. Johnson*, 180 F.3d 206, 213-14 (5th Cir. 1999) (finding no prejudice where the unimpeached witness's testimony was corroborated by physical evidence); *see also Gonzalez-Soberal v. United States*, 244 F.3d 273 (1st Cir. 2001) (noting that "a significant factor weighing in favor of finding prejudice is the absence of any corroborating evidence other than the testimony of [the unimpeached witnesses]").

A failure to object to prosecutorial misconduct can constitute ineffective assistance of counsel. *See, e.g., Gravley v. Mills*, 87 F.3d 779, 785-86 (6th Cir. 1996). For the reasons discussed above, Alexander has not established the requisite prejudice, and he thus cannot show that counsel was ineffective for failing to object to the prosecutor's closing arguments. *See Mason v. Mitchell*, 320 F.3d 604, 618 (6th Cir. 2003) ("any failure to object to prosecutorial misconduct did not constitute ineffective assistance of counsel because . . . we do not believe that the prosecutor acted improperly").

Alexander further alleges that he was denied his right to confront a witness and present a defense by the trial court's exclusion of evidence that Williams:

> (1) described herself as "slightly experienced" in her Internet advertisement;
>
> (2) had a relationship with another older man approximately one year before she posted the personal advertisement that Alexander responded to; and
>
> (3) received at least three responses to her advertisement and selected Alexander because he was willing to accept collect telephone calls from Williams.[7]

Alexander sought to use this evidence in support of his mistake of age defense, to establish Williams's alleged bias, and to demonstrate that Williams conflated certain facts. The District Court determined that the exclusion of this evidence did not violate Alexander's constitutional rights. It reasoned that the "proffered evidence did not concern Williams's bias or motivation in testifying," and to the extent that it did, the exclusion "'fell within those 'reasonable limits' which a trial court, in due exercise of discretion, has authority to establish.'"

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Clause or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v.*

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[7] The trial court prohibited the questioning of Williams concerning the first and third subjects during cross examination; the second subject was barred by a pre-trial ruling on Alexander's motion in limine.

Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). The right to present a complete defense encompasses a defendant's rights to rebut the state's evidence through cross-examination. *See Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (per curiam). However, the right to cross-examination is not absolute. *See Ohio v. Roberts*, 448 U.S. 56, 64, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The accused's right to conduct cross-examination is always subject to the trial court's broad discretion to preclude repetitive and unduly harassing examination. *Olden v. Kentucky*, 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). Thus, "'trial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

In determining whether the exclusion of evidence violates a defendant's confrontation rights, the Supreme Court has identified the following factors for a reviewing court to consider: the strength of the prosecution's overall case; the importance of the witness's testimony in the prosecution's case; whether the testimony was cumulative; the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; and the extent of cross-examination otherwise permitted. *See Van Arsdall*, 475 U.S. at 684; *see also U.S. v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (exclusions of evidence are unconstitutional if they "significantly undermine fundamental elements of

the accused's defense"). Evaluating these factors under the principles described above, we conclude that the limitations the trial court imposed fell within those "reasonable limits" which a trial court, in due exercise of its discretion, has authority to establish. *See United States v. Chandler*, 326 F.3d 210, 219 (3d Cir. 2003).

Williams's testimony was certainly crucial to the prosecution's case. However, the remaining factors support the District Court's conclusion that the exclusion of the evidence fell within reasonable limits. Significantly, Williams described at trial how she attempted to pass herself off as 18 in order to have a relationship with an older man, and she testified that her relationship with Alexander was consensual. In light of this testimony, the advertisement's description, evidence of her prior relationship, and the fact that she selected Alexander from three responses to her Internet advertisement would have been cumulative and immaterial. In addition, the case against Alexander was strong. Finally, as the District Court noted, Alexander was permitted to "explore Williams's potential bias, her credibility, her intent to deceive, and even some of her sexual practices and predilections."[8]

Alexander next claims that his trial attorney provided ineffective assistance of counsel by failing to call available character witnesses. He attached to his habeas petition affidavits from those witnesses, each of whom stated that Alexander has a "reputation as a non-violent

[8] To the extent that Alexander alleges that his attorney failed to adequately contest the exclusion of evidence, we conclude that such a claim is without merit because the evidence was properly excluded. *See Werts v. Vaughn*, 228 F.3d 178, 202 (3d Cir. 2000) ("counsel cannot be deemed ineffective for failing to raise a meritless claim").

and law-abiding person." To establish constitutional ineffectiveness of counsel, Alexander must show that his counsel's performance was "outside the wide range of professionally competent assistance" and that the incompetent performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard for ineffective assistance of counsel under *Strickland* is highly deferential and there is a presumption that counsel's actions might be sound trial strategy. *See Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999). However, "under *Strickland*, counsel's failure to assert a particular defense cannot be characterized as a 'strategy' unless counsel has investigated and consciously rejected" that defense. *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997).

This Court has held that "opinion testimony which [a defendant] introduces into the trial constitutes substantive evidence which, under certain circumstances, can raise a reasonable doubt as to his guilt, even though it does not relate to the specific criminal act of which he is accused." *United States v. Logan*, 717 F.2d 84, 88 (3d Cir. 1983). Here, Alexander's attorney interviewed three potential character witnesses but decided not to call them to testify. We conclude that this strategy was sound. As the District Court explained, presenting these witnesses would have enabled the prosecution to ask about specific instances of noncriminal misconduct, and to inquire whether two of the witnesses knew that Alexander had been convicted in 1976 of risking a catastrophe.

Alexander also claims that his attorney was ineffective in failing to demonstrate that a sexually explicit "fantasy" story sent by Alexander to Williams, which appeared to describe an encounter between an older man

and a younger woman, was in fact written by Alexander for his 32-year-old girlfriend one year before he first corresponded with Williams. The story, in which Alexander repeatedly calls his partner "little girl," was introduced by the prosecution as evidence that Alexander did not mistake Williams's age. According to Alexander, informing the jury of the story's true origins would have "removed a weapon from the prosecutor's arsenal to prove that [Alexander] was culpable and had no 'mistake of age' defense." However, the "when, for whom, and why" of the story are irrelevant. What matters is that Alexander sent a story to Williams in which the male character refers to the female character as "little girl." For this reason, and because we agree that the sexually explicit story was "highly inflammatory," trial counsel's failure to present evidence concerning its origins was not objectively unreasonable.

Finally, Alexander contends that he is entitled to relief under a cumulative error analysis. Individual errors which do not alone create constitutional error can, when combined, have a cumulative effect which does rise to the level of constitutional error. *See Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Given the strength of the evidence against Alexander, we cannot say that the alleged errors, considered together, so infected the proceedings that they denied Alexander a fundamentally fair trial.

In sum, we will affirm the order of the District Court denying Alexander's petition for writ of habeas corpus because the adjudication of his prosecutorial misconduct claim based on the "victimize her again" comment did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, or a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding. A COA will be denied as to Alexander's remaining claims because he has failed to make a substantial showing of the denial of a constitutional right.

*AMENDED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-1651

RAYMOND ALEXANDER,

Appellant

v.

ROBERT SHANNON, SUPERINTENDENT;
THE DISTRICT ATTORNEY OF THE
COUNTY OF BUCKS; THE ATTORNEY
GENERAL OF THE STATE OF PENNSYLVANIA

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 03-cv-03514)
District Judge: Honorable Stewart Dalzell

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*Argued November 15, 2005

Before: ROTH, FUENTES, AND BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on November 15, 2005. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the order of the District Court entered February 2, 2005, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

Costs taxed against appellant.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: January 24, 2006

Certified as a true copy and issued in lieu of a formal mandate on 7/6/06

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals
for the Third Circuit

RAYMOND ALEXANDER

v.

ROBERT SHANNON, et al.

CIVIL ACTION NO. 03-3514

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2005 U.S. Dist. LEXIS 1626

February 2, 2005, Decided

COUNSEL: M.D. RAYMOND ALEXANDER, Petitioner: JULES EPSTEIN, KAIRYS, RUDOVSKY, EPSTEIN & MESSING, LLP, PHILADELPHIA, PA.

M.D. RAYMOND ALEXANDER, Petitioner, PRO SE, FRACKVILLE, PA.

M.D. RAYMOND ALEXANDER, Petitioner: JONATHAN H. FEINBERG, KAIRYS, RUDOVSKY, EPSTEIN & MESSING, LLP, PHILADELPHIA, PA.

ROBERT SHANNON, Respondent: T. GARY GAMBARDELLA, OFFICE OF THE DISTRICT, CHIEF DEPUTY DIDTRICT [sic] ATTY, DOYLESTOWN, PA.

JUDGES: Dalzell, J.

OPINION BY: Stewart Dalzell

OPINION:

MEMORANDUM

Dalzell, J.

A Pennsylvania jury convicted Raymond Alexander of statutory sexual assault, involuntary deviate sexual intercourse, and corruption of a minor. He has served four

of the eight to sixteen year sentence imposed on him. We here consider his objections to Magistrate Judge Carol Sandra Moore Wells's Report and Recommendation that we deny his petition.

To be sure, Alexander received an imperfect trial. Most notably, the prosecutor made an inflammatory comment during closing argument. But it is well-settled that our Constitution does not guarantee criminal defendants the right to a perfect trial, *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1988) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."). As we explain below, although not free from doubt, Alexander got the fair trial that our Constitution requires.

A. Factual and Procedural Background

The Superior Court summarized the tawdry facts of this case:

> In the spring of 2000, Alexander responded to a personal advertisement placed on the Yahoo.com website by Carrie Williams. At the time, Williams was 15 years old and living in Kentucky. Over the next couple of months, the pair developed a relationship wherein they would engage in telephone and Internet "sex" and role-playing. Throughout their relationship, Williams represented that she was 18 but still living with her parents.
>
> On May 5, 2000, Alexander drove to Kentucky to meet Williams in person. Alexander picked up Williams at the entrance of her development and drove to a nearby soccer field where the two fondled and kissed each other. Thereafter, Alexander

drove Williams home before going back to his hotel. That evening, Williams got into an argument with her parents and ran away from home. Using her mother's cellular phone, Williams called Alexander at his hotel and arranged to have him pick her up. When Alexander arrived, Williams showed him a fake identification card in an attempt to prove she was 18. At Alexander's request, Williams accompanied Alexander back to Buck's [sic] County. Upon arriving at Alexander's house, the two engaged in anal and oral intercourse.

Williams's parents conducted a search of her belongings and discerned that she had been communicating with Alexander and that he had been staying at a local hotel. Shortly thereafter, the Louisville Police Department contacted Corporal Getters of the Doylestown Police Department and apprised him of the situation. Corporal Getters, along with three other officers, proceeded to Alexander's residence. Corporal Getters knocked on the door and asked Alexander as to Williams's whereabouts. Alexander directed Corporal Getters to the bedroom where Williams was then hiding. Corporal Getters arrested Alexander for Interfering with the Custody of a Minor. In response Alexander stated, "She's 18. I have proof that she's 18." The police found Williams in Alexander's bedroom lying naked under the sheets and took her into protective custody.

The Commonwealth charged Alexander with the aforementioned crimes as well as two drug violations that were later severed for a separate trial. In this matter, Alexander attempted to defend against the charges by demonstrating he was mistaken as to Williams's age. A jury [on March 28, 2001] found Alexander guilty of [Involuntary

Deviate Sexual Intercourse ("IDSI")], Statutory Sexual Assault and Corruption of a Minor.

Commonwealth v. Alexander, 803 A.2d 787, No. 2194, EDA 2001, Mem. Op., at 1-3 (Pa. Super. Apr. 25, 2002) ("Sup. Ct. Op.").

On August 1, 2001, Judge Edward G. Biester, Jr., of the Bucks County Court of Common Pleas, sentenced Alexander to eight to sixteen years in prison for the IDSI conviction to be followed by twenty years of state probation. *Commonwealth v. Alexander,* Aug. 1, 2001 Sentencing Hrg., at 26-27. On October 10, 2001, Judge Biester denied Alexander's direct appeal of his sentence and conviction.[1] *See Commonwealth v. Raymond Alexander,* No. 6019-00, Direct Appeal Opinion ("Trial Ct. Op."), at 1-22. Alexander then appealed to the Superior Court of Pennsylvania, which, on April 25, 2002, affirmed Judge Biester. *See* Sup. Ct. Op., at 15.

On June 6, 2003, Alexander filed the instant petition for a writ of habeas corpus, which the Commonwealth answered on August 4, 2003. We referred his petition to the Honorable Carol Sandra Moore Wells for a Report and Recommendation. On August 30, 2004, Judge Wells recommended that we deny the petition. Alexander then filed both counseled objections and, later, *pro se* objections. After carefully reviewing the Report and Recommendation and considering both sets of objections, we shall deny his petition.

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[1] Alexander filed a Motion for Reconsideration of Sentence. By order dated August 13, 2001, Judge Biester reduced his term of probation for the IDSI conviction to ten years. August 30, 2004 Report and Recommendation ("Rep. & Rec."), at 3.

B. Legal Analysis

Alexander interposes six broad objections to Judge Wells's Report and Recommendation:

> 1. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's closing argument that an acquittal was tantamount to a second rape of the complainant.
>
> 2. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's use of evidence known to be false, and the related finding of the Magistrate Judge that trial counsel was not ineffective in failing to object or prove the falsity of the proffered testimony.
>
> 3. Petitioner objects to the Magistrate Judge's determination that he was not denied Confrontation rights, and the correlate right to present a defense (as well as the effective assistance of counsel), by exclusion of evidence of the complainant's behavior *and words,* all critical to his defense; and to the related determination of the Magistrate Judge that the state court properly considered and applied federal law in denying relief on this claim.
>
> 4. Petitioner objects to the Magistrate Judge's determination that his sentence is constitutional.
>
> 5. Petitioner objects to the Magistrate Judge's determination that his counsel was effective when counsel failed to present character evidence or evidence supportive of his defense.

> 6. Petitioner objects to the Magistrate Judge's determination that certain claims are defaulted.

Petitioner's Objections to the Magistrate Judge's Proposed Findings, Report and Recommendation ("Pet.'s Obj."), at 1-2. We review Alexander's objections *de novo*. *See* 28 U.S.C. § 636(b)(1).

In evaluating a habeas petition, we must give deference to state courts' legal and factual determinations. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") mandates this deference:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(1) requires deference to state courts' legal conclusions. Under § 2254(d)(1), a state-court decision is "contrary to" clearly established federal law if it (1) "contradicts the governing law set forth in [the Supreme Court's] cases" or (2) "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]

Court and nevertheless arrives at a [different] result." *Williams v. Taylor,* 529 U.S. 362, 405, 406, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). In this regard, the "state court need not even be aware of [Supreme Court] precedents, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Mitchell v. Esparza,* 540 U.S. 12, 16, 157 L. Ed. 2d 263, 124 S. Ct. 7 (2003) (*per curiam*) (internal quotation marks omitted).

Under the same section, a state court decision involves an "unreasonable application"[2] of clearly established federal law when it (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case;" or (2) "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."[3] *Williams,* 529 U.S. at 407.

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[2] In conducting the "unreasonable application" inquiry, "decisions of federal courts below the level of the United States Supreme Court may be helpful to [a federal court] in ascertaining the reasonableness of state courts' application of clearly established United States Supreme Court precedent." *Marshall v. Hendricks,* 307 F.3d 36, 71 n.24 (3d Cir. 2002). At the same time, however, "cases not decided by the Supreme Court do not serve as the legal benchmark against which to compare the state decision. At the end of the day, AEDPA 'confine[s] the authorities on which federal courts may rely' in a habeas case to Supreme Court decisions." *Fishetti v. Johnson,* 384 F.3d 140, 149-50 (3d Cir. 2004) (quoting *Lewis v. Johnson,* 359 F.3d 646, 652 (3d Cir. 2004)).

[3] As our Court of Appeals recently commented, "The Supreme Court has not fully fleshed out [the] 'extension of legal principle' approach to § 2254(d)(1)." *Fishetti v. Johnson,* 384 F.3d 140, 148 (2004). Compare *Rompilla v. Horn,* 355 F.3d 233, 240 (3d Cir. 2004) (unreasonable application includes unreasonable failure to extend) with *Marshall*

(Continued on following page)

Section 2254(d)(2) requires deference to state courts' factual conclusions. Under it, "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell,* 537 U.S. 322, 340, 154 L. Ed. 2d 931, 123 S. Ct. 1029 (2003). Moreover, a reviewing court must read § 2254(d)(2) in conjunction with § 2254(e), which requires that "a determination of a factual issue made by a State court shall be presumed to be correct" unless the petitioner rebuts "the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

With these principles in mind, we address Alexander's objections.

1. Petitioner objects to the Magistrate Judge's determination that his Due Process rights were not violated by the prosecutor's closing argument that an acquittal was tantamount to a second rape of the complainant.

During his closing argument, the prosecutor made the following remark:

> We heard Mr. Schneider [defense trial counsel] go on and on about her, and she's been dragged through the mud, she's been victimized by this

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v. Hendricks, 307 F.3d 36, 51 n.2 (3d Cir. 2002) (noting the Supreme Court has not definitively adopted unreasonable extension theory).

> man under the facts of this case, and they would like you to victimize her again.[4]

3/28/01 Trial Tr., at 116. Alexander argues that, by likening an acquittal to the re-victimization of Williams, the prosecutor engaged in misconduct so prejudicial that it robbed him of due process. He relies on *Moore v. Morton*, 255 F.3d 95, 105 (3d Cir. 2001), in which our Court of Appeals condemned the following statement:

> The last thing I have to say is that if you don't believe [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her.

Id. at 101. Because the two statements are similar, Alexander argues, we must likewise condemn his prosecutor's comment.[5]

> Regarding this issue, the Superior Court noted that the prosecutor's remark was subject to multiple interpretations; therefore, Alexander failed to "demonstrate that the prosecution's comments had the unavoidable effect of, [sic] forming in the jury's mind a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." Sup. Ct. Op., at 13.
>
> In her Report and Recommendation, Judge Wells concluded that Alexander's reliance on *Moore* is misplaced, mainly because the Court of

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[4] Trial counsel objected, and Judge Biester responded, "It's argument."

[5] He relies on the "contrary to" clause of § 2254(d)(1). Pet.'s Mem. of Law in Support of His Previously Filed Pet. for Writ of Habeas Corpus ("Pet.'s Mem."), at 15.

> Appeals held that the "perpetrating a worse assault" argument, standing alone, amounted to no due process violation. Rep. & Rec., at 11-13.

Prosecutorial misconduct may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). To rise to a due process violation, the misconduct must constitute a "'failure to observe that fundamental fairness essential to the very concept of justice.'" *Id.* at 642 (quoting *Lisenba v. California,* 314 U.S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280 (1941)).

In making this determination, Supreme Court precedent requires us to weigh (1) the severity of the prosecutor's misconduct, (2) the effect of any curative instruction, and (3) the quantum of evidence against the defendant. *Moore,* 255 F.3d at 107 (citing *Darden v. Wainwright,* 477 U.S. 168, 182, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986), *reh'g denied,* 478 U.S. 1036, 92 L. Ed. 2d 774, 107 S. Ct. 24 (1986); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643-44, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974)).

As noted, Alexander relies on *Moore,* a case where a white female was sleeping alone in her bedroom when she awoke to a sexual predator's chokehold. 255 F.3d at 97. He proceeded violently to rape her. *Id.* During the rape, the victim glanced at her attacker just once. *Id.* at 119. In the aftermath, she could identify the alleged rapist, Clarence Moore, an African-American, only with the aid of "hypnotically enhanced memory.". *Id.* at 98.

In his closing argument at Moore's trial, the prosecutor made three inflammatory comments. First, he suggested that Moore, whose wife was white, had a proclivity

for white women and, therefore, selected the victim because of her race. *Id.* at 99-100. Second, he argued that, because Moore's wife – who recently gave birth – had "bleeding breasts," Moore raped the victim when his "need for sexual release" was the "greatest." *Id.* at 100-01. Last, the prosecutor uttered the remark that Alexander likens to his prosecutor's: "The last thing I have to say is that if you don't believe [the victim] and you think she's lying, then you've probably perpetrated a worse assault on her." *Id.* at 101. The trial court sustained Moore's objection and issued a curative instruction for each comment. *Id.* at 100-02.

In his habeas petition, Moore argued that the prosecutor's statements deprived him of due process. *Id.* at 97. Our Court of Appeals agreed, and reversed the district court's denial of his petition. *Id.* at 120.

The Court of Appeals weighed (1) the severity of the prosecutor's misconduct, (2) the effect of the curative instructions, and (3) the quantum of evidence against Moore. *Id.* at 107, 113-20. It concluded that the "selection" argument and "perpetrating a worse assault" argument were both severe but tempered somewhat by the curative instructions.[6] *Id.* at 118. It found that the "sexual release" argument was less worrisome and easily remedied by the trial judge's curative instruction. *Id.* at 116. Lastly, the court looked to the weight of inculpatory evidence and found it weak. *Id.* at 118-19; *see also United States v. Thomas*, 315 F.3d 190, 203 n.5 (3d Cir. 2002) ("The court [in *Moore*] found the trial so infected with unfairness that

[6] The panel emphasized, however, that, were the "perpetrating a worse assault" argument "the only improper argument, we do not believe Supreme Court precedent would require finding a denial of due process." *Id.* at 118.

it warranted a finding of prejudice, *especially given that the bona fide evidence for the prosecution was not sufficiently strong*") (emphasis added). Because the misconduct, cumulatively, was severe and the evidence was weak, the court held the prosecutor violated Moore's rights. *Id.* at 119-20.

Upon careful analysis, Alexander's reliance on *Moore,* while entirely legitimate, must in the end fail. Viewed in isolation, the words of both prosecutors – Alexander's and Moore's – do bear some resemblance, but close scrutiny reveals material differences.

In the first place, the comments are not cognates. In Alexander's case, the prosecutor stressed that Williams had "been victimized by this man under the facts of this case," which properly focused the jury's attention on the evidence before adding the gratuitous comment that the defense "would like you to victimize her again." The prosecutor's statement in *Moore* was tantamount to a threat: If "you think she's lying, then you probably perpetrated a worse assault on her," which may fairly be taken as meaning, if you don't accept her testimony, then you will do something worse to her than the strangling and brutal rape you heard about. The equation of the jury's finding that "she's lying" with "perpetrating a worse assault on her" is thus not only inflammatory, but tells the jury that it would be committing a more heinous offense than the defendant was charged with committing. Thus, the prosecutor's victimization remark here, though improper, pales in comparison to the prosecutor's lurid threat in *Moore.*

This textual comparison anticipates a second crucial difference, and that is context. In *Moore,* the defendant

invaded the victim's bedroom in the middle of the night, strangling and raping her brutally. In contrast, Williams testified that her sex with Alexander was factually, though not legally, consensual. There certainly was no violence of any sort. The comment made here was thus not said in anything like the context of Moore's savagery. In short, the remark in the context of this case was much milder than the one in *Moore*.[7]

We now turn to the second factor, the efficacy of a curative instruction. Troublingly, there was none, although Judge Biester minimized the remark as "argument" immediately after the prosecutor made it.[8] This factor weighs in Alexander's favor.

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[7] It is also well to remember that metaphor is often the hallmark of effective advocacy, though such devices carry the perils we meet here.

[8] A part of Judge Biester's general instruction also softened the comment's prejudicial effect when he gave "argument" this extended explanation:

> The speeches of the attorneys as you know and as they both have forthrightly told you are not part of the evidence in the case, and you should not consider them as such. However, in deciding the case you should carefully consider the evidence in light of the various reasons and arguments which each lawyer has presented to you.
>
> It's the right, in fact it's the duty of each of these attorneys to discuss the evidence in a manner which is most favorable to the side that lawyer represents, and you should be guided by each lawyer's arguments to the extent they're supported by the evidence and insofar as they help you in applying your own reason and your own common sense.
>
> However, you're not required to accept the arguments of either lawyer. It's for you and you alone to decide the case based on the evidence as it was presented from the witness stand and in accordance with the instructions I'm now providing to you.

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Last, we consider the quantum of evidence against Alexander. In *Moore,* the evidence was weak. During the assault, the victim briefly glanced at her attacker, and she identified Moore only after undergoing hypnosis. 255 F.3d at 119-20. By contrast, the incriminating evidence in Alexander's case was either not in dispute or substantial, as we now show.[9]

We first highlight the elements of each offense. One commits involuntary deviate sexual intercourse when he (1) engages in "deviate sexual intercourse" with another person (2) under sixteen (3) if the culprit is four or more years older than the complainant and (4) they are unmarried. 18 Pa.C.S.A. § 3123(a)(7). "Deviate sexual intercourse" includes "sexual intercourse per os or per anus between human beings. . . ." 18 Pa.C.S.A. § 3101.

Statutory sexual assault occurs when one (1) engages in "sexual intercourse" (2) with a complainant under sixteen (3) if the culprit is four or more years older than the complainant. 18 Pa.C.S.A. § 3122.1. "Sexual intercourse," in addition to describing the "ordinary meaning" of the term, "includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa.C.S.A. § 3101.

Last, corruption of a minor occurs when (1) one over eighteen, (2) "by any act corrupts or tends to corrupt the

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3/28/01 Trial Tr., at 138-39.

[9] We here note that, in *Marshall v. Hendricks,* 307 F.3d 36, 69 (3d Cir. 2002), our Court of Appeals interpreted *Moore* as "establishing the principle that the stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker."

morals" (3) of any minor under eighteen. 18 Pa.C.S.A. § 6301(a).

Because none of these statutes specifies a *mens rea* requirement, Pennsylvania law requires that, at the very least, the defendant act negligently. *See* 18 Pa.C.S.A. § 302(a).[10] Furthermore, 18 Pa.C.S.A. § 3102 provided Alexander with an affirmative defense to statutory sexual assault and involuntary deviate sexual intercourse: "When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age." A section of the corruption-of-minors statute precluded this affirmative defense, however. *See* 18 Pa.C.S.A. § 6301(d)(1) ("Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years").

At the time of the events, Williams was fifteen, and Alexander was fifty-two. Trial Ct. Op., at 1, 2. The trial court found that, upon their arrival at Alexander's home, he and Williams twice had sexual relations: "Shortly after arriving at the house. [sic] Appellant expressed his desire to engage in sexual intercourse with C.W. Appellant and

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[10] Under Pennsylvania law, one acts negligently with respect to a material element of an offense when "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." 18 Pa.C.S.A. § 302(b)(4). Furthermore, the "risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *Id.*

C.W. proceeded to the bedroom where Appellant performed oral sex on C.W. The two later engaged in anal sex." *Id.* at 3. The trial court prefaced this quotation by noting, "The evidence at trial revealed, without contradiction, the following. . . ." *Id.* at 1. Thus, we view the findings subsumed in this language as factual findings worthy of AEDPA deference. *See* 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e). This evidence alone permitted the jury to convict Alexander.

Williams also described four other lubricious episodes. First, she testified that, almost immediately after arriving at his home, Alexander "put his mouth on [her] vagina." 3/27/01 Tr., 124. Second, she testified that Alexander then "rubb[ed]" her anus with his fingers. *Id.* Third, later in the day, Williams performed fellatio on Alexander, at his request. *Id.* at 129-30. Fourth, shortly after receiving fellatio, Alexander "put his penis inside of [Williams's] vagina. . . ." *Id.* at 131.

At trial, Alexander asserted an 18 Pa.C.S.A. § 3102 "reasonable mistake of age" defense.[11] To be sure, Alexander presented evidence showing that Williams attempted to deceive him about her age. But much stronger evidence suggested that he either knew or suspected or should have known she was a minor.

To begin, the prosecution adduced direct evidence of Alexander's mental state. After their first sexual encounter in Alexander's home, Williams joined him in the family room and said she "didn't feel like he wanted me there; like he didn't want to be with me." 3/27/01 Trial Tr., at 129.

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[11] Also, evidence about the extent to which Williams deceived Alexander was relevant to negate his *mens rea*.

Alexander then took her in his arms and said, "Of course I want you here, baby. I'm risking *25 years in jail* to be with you." *Id.* (emphasis added).

Circumstantial evidence also incriminated him. First, Alexander demanded that Williams call him "Daddy," *Id.* at 92, 115, 181, and she acceded. *Id.* at 93, 193, 223. Second, Alexander usually referred to Williams as "baby" or "little girl," and he liked her to say she was a virgin. *Id.* at 93. Third, Alexander and Williams role-played telephonically, with Alexander playing a principal and Williams playing a student sent for discipline. *Id.* at 92, 114. Fourth, Alexander knew that Williams was a high-school student who lived at home with her parents. *Id.* at 176-77, 105. Fifth, Alexander felt the need, on multiple occasions, to demand proof of William's age. *Id.* at 106, 107, 183, 184, 195. Once, he exclaimed, "Swear to me that you're 18." *Id.* at 106.

Tellingly, the evidence also showed that Alexander appeared sensitive about being seen publicly with Williams. During the entire car ride from Kentucky to his home in Pennsylvania, Alexander stopped twice, at a gas station and a grocery store, *id.* at 121-22, but Williams did not get out. *Id.* Furthermore, when Williams walked to the window of Alexander's home – where neighbors presumably could see her – Alexander immediately "seemed kind of nervous about [her] being there." *Id.* at 128.

Alexander also seemed physically uncomfortable with having Williams in his house. Shortly after they arrived, Alexander began vomiting. *Id.* at 126. Williams also testified that he was "Not too good, cold sweat, he looked sick. He looked real sick. He had a towel around his

shoulders." *Id.* at 127. From this physical reaction, the jury could have inferred that he feared she was underage.

To summarize, on one side of the scale, there was no curative instruction other than Judge Biester's description of the remark as "argument", and that weighs in Alexander's favor. The prejudicial effect of the improper statement in this case was, however, on its terms and in context low, and the evidence against Alexander was weighty. Although a close question – certainly close enough to warrant a certificate of appealability – we find no due process violation.

We now address two additional objections Alexander raises. First, Judge Wells found *Moore* inapposite because our Court of Appeals condemned the "perpetrating a worse assault" argument in conjunction with others, a finding Alexander argues was error. But as the Court of Appeals emphasized, "Were this the only improper argument, we do not believe Supreme Court precedent would require finding a denial of due process."[12] 255 F.3d at 118. With this emphasis, Judge Moore's holding that *Moore* offers little help to Alexander is not entirely without foundation.

Second, Alexander objects to Judge Wells's conclusion that the Superior Court's decision was not "contrary to" or an unreasonable application of federal law, despite the Superior Court's use of the wrong test. The Superior Court applied Pennsylvania law and asked whether "the prosecution's comments had the unavoidable effect of, [sic] forming in the jury's mind a fixed bias and hostility toward

[12] The Court reasoned, "Taken in isolation, any prejudice stemming from the 'perpetrating a worse assault' argument could be cured with strong instructions like those the trial judge issued here." *Id.* at 118.

the defendant so that they could not weigh the evidence objectively and render a true verdict." Sup. Ct. Op., at 13. While the Superior Court did, in fact, employ the incorrect test – they should have used the three-factor balancing test set out above – this is immaterial. As the Supreme Court holds, the "state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparza,* 540 U.S. 12, 16, 157 L. Ed. 2d 263, 124 S. Ct. 7 (2003) (*per curiam*) (quoting *Early v. Packer,* 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (*per curiam*)).

2. Petitioner objects to the Magistrate Judge's determination that his Due process rights were not violated by the prosecutor's use of evidence known to be false, and the related finding of the Magistrate Judge that trial counsel was not ineffective in failing to object or prove the falsity of the proffered testimony.

Alexander claims that the prosecutor presented evidence – and then referenced it in closing argument – that he either knew or should have known was false, and this constituted a due process violation. He also argues that his own lawyer's failure to object or refute this evidence constituted ineffective assistance of counsel.[13]

[13] Alexander proceeds under 28 U.S.C. § 2254(d)(2). He alleges that the Superior Court's "failure to acknowledge the 'fact' of the report's existence resulted 'in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." Pet.'s Mem., at 20. He also claims that the Superior

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Court's analysis is "contrary to" settled federal law. *Id.* at 20 n.8. *See* 28 U.S.C. § 2254(d)(1).

The Superior Court addressed this argument:

> Initially, we observe that the offending testimony was merely a recollection of events leading to Alexander's identification and apprehension. Whether the proffered testimony was false is a question left in the hands of the jury. *See Commonwealth v. Yaninas,* 722 A.2d 187, 189 (Pa.Super. 1999) (stating "the jury, as the finder of fact, is free to believe all, some, or none of the testimony presented to it"). Accordingly, we are precluded from accepting Alexander's premise that such testimony was false.
>
> With respect to the prosecutor's reference to the "false area code" in his closing remarks, it is well established that a prosecutor, just as a defense attorney, must have reasonable latitude in presenting a case to the jury and must be free to present his or her argument with logical force and vigor. *See Commonwealth v. Chmiel,* 2001 PA Super. 34, 777 A.2d 459, 466 (Pa.Super. 2001). The prosecutor's closing remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony. *See id.* Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. *See id.*
>
> . . . .
>
> In light of the testimony offered by Williams's father, we conclude that the prosecution's reference to the "fake area code" merely raised a legitimate inference of deception based upon properly admitted evidence and thus the prosecutor did not engage in misconduct. Therefore, we conclude that Alexander failed to demonstrate reversible error. *See Chmiel,* 777 A.2d at 466. Further, because the prosecution was permitted to refer to properly admitted evidence in his closing remarks, defense counsel had a reasonable basis not to object. Therefore, we conclude that counsel did not render [ineffective assistance of counsel].

Sup. Ct. Op., at 8-9.

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The issue involves an area code. In his May 6, 2000 police report, Corporal Daniel T. Getters wrote that Alexander registered at the Fairfield Inn in Louisville, Kentucky using a "215" area code. *See* Pet.'s Mem., Ex. C. The prosecution provided this document to defense counsel. Nevertheless, during direct testimony, Williams's father, John M. Williams, testified that Alexander used a different area code.

Specifically, while investigating Carrie's disappearance, John Williams deduced that Alexander had stayed at the Fairfield Inn. He then drove there and examined the Inn's registration cards:

> Q: Okay. The hotel showed you the information, however; is that correct?
>
> A: They did.
>
> Q: Did they also show you his phone number?
>
> A: As part of the registration card a phone number was on there. What I recognized was not the area code, the area code was different, but the last seven digits were very familiar from what we had in our home. I remember calling my wife and I asked her to repeat the last seven digits. And

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In her Report and Recommendation, Judge Wells first noted that Alexander's claim that the Superior Court never referred to Corporal Getter's report was incorrect. *See* Rep. & Rec., at 16-17; Sup. Ct. Op., at 7. Then, she concluded that "No *Miller* [*v. Pate*, 386 U.S. 1, 17 L. Ed. 2d 690, 87 S. Ct. 785 (1967)] type deception transpired in the case at bar. Rather, a remark by the prosecutor was forwarded to the jury as a matter of opinion." Rep. & Rec., at 17. (In *Miller*, the Supreme Court held that a state prisoner was entitled to habeas relief when he showed that a pair of stained undershorts he owned that the State repeatedly described as stained with blood were really stained with paint). Thus, she recommended that we deny this claim. *Id.*

there was an identical match on the last seven digits.

Q: Just so I'm clear, the last seven digits of the telephone number on the registration card at the hotel matched the last seven digits of this piece of paper that you and your wife had pieced together that was ripped up in Carrie's room; is that correct?

A: That's correct.

. . . .

Q: The registration card at the hotel, did that have a 215 area code on it?

A: No it did not.

Q: It had some other numbers?

A: Yes.

3/27/01 Trial Tr., at 66-67. In other words, Corporal Getter wrote that Alexander used a "215" area code, but John Williams testified that he used a different one. Nevertheless, Alexander's lawyer never objected or entered the report into evidence.

At the end of trial, during closing argument, the prosecutor referenced John Williams's version: "He wanted her so bad that he put a fake or false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to talk about deception? Look there, not to a 15-year old." 3/28/01 Trial Tr., at 122. Again, Alexander's lawyer voiced no objection.

A conviction obtained through false testimony is repugnant to our Constitution. *See Mooney v. Holohan*, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935).

Specifically, it is unconstitutional when the prosecution's case "includes perjured testimony and [] the prosecution knew, or should have known, of the perjury." *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). "The same is true when the government, although not soliciting false evidence, allows it to go uncorrected when it appears at trial." *United States v. Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992) (citing *Giglio v. United States*, 405 U.S. 150, 153, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)).

Nonetheless, the "touchstone of due process analysis is not prosecutorial misconduct, but the fairness of the trial." *Biberfeld*, 957 F.2d at 102. Thus, discovering that a prosecutor obtained a conviction using false evidence by no means ends the inquiry; instead, the court may reverse the conviction only "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976); *Giglio*, 405 U.S. at 154.

To synthesize, we must ask four questions: (1) whether false testimony was introduced, (2) whether the testimony either was or should have been known to the prosecution to be false, (3) whether the testimony went uncorrected, and (4) whether the false testimony was prejudicial in the sense defined above. *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003) (Calabresi, J.).

It is by no means clear whether the prosecution offered false evidence.[14] The police report stating Alexander used a

[14] It is also unclear whether the prosecutor's implication, during closing, that Alexander "saw" Carrie Williams's $42 pay stub was false. *See pro se* Supp. Obj., at 29. In fact, all the prosecutor did was invite the jury to "look at her stub", 3/28/01 Trial Tr. at 122, and said nothing about whether Alexander "saw" it. What is clear is that Alexander

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"215" area code does not automatically refute John Williams's testimony. There is, at least, an equal chance that Corporal Getters erred: he was subject to the same cognitive dangers – particularly memory and perception – as Williams. Furthermore, because no party entered the police report into evidence, the jury never tested its veracity. We refuse now to assume the jury's role and hold that Getter was correct and John Williams wrong.

But even if we did conclude that Williams testified falsely, the prosecution knew about it, and the testimony went uncorrected, we would still have as a final question whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). Here, there is none. Overwhelming evidence inculpated Alexander. *See supra* pp. 14-18. Furthermore, whether Alexander used his real area code at a Kentucky motel at most tangentially bore on the jury's two main inquiries: (1) whether he had sex with a minor and (2) whether he reasonably mistook her age. This reality animated Judge Biester's remark, "In any event, any misstatement by the complainant's father on this point was immaterial and could not have reasonably affected the outcome of the trial." Trial Ct. Op., at 13. We agree.

Alexander also contends that the prosecutor deprived him of due process by referencing John Williams's allegedly false testimony during his closing. Because we do not

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himself argues that, at most, the prosecutor merely referred "evidence not of record," Supp. Obj., at 30, and, more importantly, whether he "saw" it had no bearing on whether he had sex with her, the acts for which he was convicted.

conclude that John Williams testified falsely, we reject this claim. In any event, even if John Williams did testify falsely, the evidence against Alexander was so strong that we would still find no due process violation. *See Marshall v. Hendricks,* 307 F.3d 36, 69 (3d Cir. 2002) ("The stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker").

We last turn to Alexander's ineffective-assistance claim. *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) sets forth the clearly established law:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. Essentially, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," meaning "reasonableness under prevailing professional norms." *Id.* at 688.

When engaging in this inquiry, we must be "highly deferential" and make "every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. In other words, we "must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* That is to say, the "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 100 L. Ed. 83, 76 S. Ct. 158 (1955)).

We must first determine whether counsel performed deficiently. Alexander claims, "Ineffectiveness is clear – the failure to use significant impeachment material cannot be justified as a reasonable trial strategy." Pet.'s Obj., at 17-18. He relies on *Berryman v. Morton,* 100 F.3d 1089, 1098-99 (3d Cir. 1996). *See* Pet.'s Obj., at 18. In *Berryman,* the defendant's rape conviction rested solely on the alleged victim's uncorroborated, out-of-court identification of him and her in-court identification two years later. *Id.* at 1097. Our Court of Appeals emphasized that "the reliability of this victim's uncorroborated identification of Berryman cuts directly to the heart of the only evidence against Berryman." *Id.* at 1099. It then held that trial counsel's failure to use extensive inconsistent identification testimony of the alleged victim from three prior trials – including recanted testimony from one – constituted ineffective assistance. *Id.* at 1097-99, 1101-02.

Alexander's reliance on *Berryman* is misplaced. In *Berryman,* the "heart of the only evidence against Berryman" was the alleged victim's identification testimony; thus, her previous inconsistent identifications directly bore on Berryman's culpability. *Id.* at 1099. Unlike the inconsistency in *Berryman,* Corporal Getter's claim that Alexander used a "215" area code and John Williams's testimony that he didn't was, at most, peripheral.

Moreover, standing in defense counsel's shoes, compelling reasons could have led him to refrain from attacking John Williams on this inconsistency. First, whether Alexander used his real area code at the hotel was relatively tangential; hence, the value of stressing the inconsistency was low. Second, as the father of a teenage rape victim, John Williams was sympathetic. Hence, Alexander's lawyer may have declined to confront John Williams on this point to avoid antagonizing the jury. Perhaps this is why defense counsel chose to limit his cross-examination to under three transcript pages. *See* 3/27/01 Trial Tr., at 71-73.

In short, Alexander fails to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland,* 466 U.S. at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 100 L. Ed. 83, 76 S. Ct. 158 (1955)).

3. Petitioner objects to the Magistrate Judge's determination that he was not denied Confrontation rights, and the correlate right to present a defense (as well as the effective assistance of counsel), by exclusion of evidence of the complainant's behavior *and words,* all critical to his defense; and to the related determination of the Magistrate Judge that the state court properly considered and applied federal law in denying relief on this claim.

Under Pennsylvania's Rape Shield Law, 18 Pa. C.S.A. § 3104(a), the trial court precluded Alexander from presenting evidence that would have shown the following:

1. In her Internet advertisement, Williams described herself as "slightly experienced," 3/27/01 Trial Tr., at 248; 3/28/01 Trial Tr., at 79-80;[15]

2. About a year before her advertisement, Williams had sexual relations with another older man, 3/26/01 Mot. *in Limine* Hrg. Tr., at 33-38; and

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[15] Judge Biester tried to strike a compromise:

> THE COURT: I have a solution for this one that you're all going to like. It's going to satisfy everybody. Obviously you can't use this form because its got writing on it or print and so forth. So there must be a clean form somewhere. Is there?
>
> [DEFENSE]: Absolutely.
>
> THE COURT: This can be received as an exhibit in exactly the manner in which it was originally created.
>
> [DEFENSE]: Very good.
>
> THE COURT: You guys can stipulate that this contains a fabrication, 18; the age. Slightly experienced, a fabrication. That way – sir, listen to me before you do this body language with me.
>
> That way you get what you really legitimately want, which is to show that she was portraying herself as something more than just a 15-year-old child. And I get the satisfaction of protecting her rights and the law with respect to the Rape Shield law. It solves your legitimate needs and it solves the Rape Shield problem.
>
> [PROSECUTION]: I stipulate to that, you Honor.
>
> [DEFENSE]: To quote you, the gritty truth is that she is not slightly experienced. She is more than – that she is "slightly experienced" I will not stipulate to that, your Honor, with all due respect.
>
> THE COURT: That's fine. You've declined it. I've offered you a solution which meets your legitimate needs without going into the illegitimate requirements that you want. That's fine. We're in recess.

3/27/01 Trial Tr., at 247-48. *See also* 3/28/01 Trial Tr., at 79-81.

> 3. Williams received three responses to her advertisement, and she selected Alexander because he was the only one who would accept her collect calls, 3/27/01 Trial Tr., at 172.[16]

Alexander wanted to "prove that [he] did not know that [Williams] was under the age of eighteen. . . ." Pet.'s Mem., at 23.[17] *See also Commonwealth v. Alexander,* No. 6019/2000, Mot. to Admit Evid. of Victim's Prior Relationship, at 2 ("The evidence is admissible to show that Carrie Williams has a unique interest in older men, that she deceives those men into believing she is over eighteen years of age and that she is skilled at this deception. Such deception led the Defendant to reasonably believe her age to be eighteen years at the time of this incident").

He first argues that the trial court's rulings violated his right to confront witnesses.[18] The Sixth Amendment guarantees the criminal defendant a right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The core of the Confrontation Clause is the right of every defendant to test the credibility of witnesses through cross-examination. *Davis v. Alaska,* 415 U.S. 308, 315-16, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974).

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[16] Judge Biester did not allow questioning of Williams as to the first and third subjects during cross-examination, while he barred Alexander from probing into the second subject at a pretrial hearing.

[17] For each claim subsumed in this objection, Alexander proceeds under 28 U.S.C. § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. *See* Pet.'s Mem., at 24.

[18] Judge Wells's Report and Recommendation chronicles the Commonwealth courts' treatment of Alexander's confrontation claim. *See* Rep. & Rec., at 22-23. Evaluating their analyses, Judge Wells found "no state court error in balancing competing interests." *Id.* at 23. She also concluded, "No constitutional right was implicated by the suppression of these facts." *Id.* at 23-24.

But the Confrontation Clause does not grant defendants *carte blanche* to employ all conceivable methods: "It does not follow . . . that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986). On the contrary, trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Id.* In this way, the Confrontation Clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (quoting *Delaware v. Fensterer,* 474 U.S. 15, 20, 88 L. Ed. 2d 15, 106 S. Ct. 292 (1985)).

Interpreting established federal law, our Court of Appeals has formulated a two-step test. First, we must determine whether the trial court's ruling "significantly inhibited" the defendant's right to inquire into the witness's "motivation in testifying". Second, if the ruling did significantly inhibit the defendant's exercise of that right, we must decide whether the "constraints it imposed on the scope of [the defendant's] cross-examination fell within those 'reasonable limits' which a trial court, in due exercise of its discretion, has authority to establish." *United States v. Chandler,* 326 F.3d 210, 219 (3d Cir. 2003). Also, as a third step, we must conduct a harmless-error analysis, if warranted. *Olden v. Kentucky,* 488 U.S. 227, 232-33, 102 L. Ed. 2d 513, 109 S. Ct. 480 (1988) ("The constitutionally improper denial of a defendant's opportunity to

impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman [v. California,* 386 U.S. 18, 87 S. Ct. 824 (1967)] harmless-error analysis").

At the outset, Alexander's proffered evidence did not concern Williams's bias or motivation in testifying. Alexander himself argues that he sought to introduce this evidence to "prove that [he] did not know that [she] was under the age of eighteen. . . ." Pet.'s Mem., at 23. In other words, he wanted to introduce this evidence to advance his affirmative defense, not prove bias. Thus, he did not even seek to question Williams about bias or "motivation in testifying" – the concern of the courts in four cases he cites. *See* Pet.'s Obj., at 21; *Davis v. Alaska,* 415 U.S. 308, 318, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) (holding that trial court unconstitutionally prevented petitioner from cross-examining key prosecution witness about his probationary status and concern that he might be a suspect in the burglary for which petitioner was tried); *Olden v. Kentucky,* 488 U.S. 227, 233, 102 L. Ed. 2d 513, 109 S. Ct. 480 (1988) (holding that trial court unconstitutionally blocked petitioner from cross-examining the prosecution's primary witness-about his cohabitation with rape victim); *Redmund v. Kingston,* 240 F.3d 590, 591, 593 (7th Cir. 2001) (holding that petitioner's confrontation right was infringed when trial court precluded him from cross-examining alleged statutory rape victim regarding her previous fabricated rape report); *Wealot v. Armontrout,* 948 F.2d 497, 500 (8th Cir. 1991) (holding that trial court unconstitutionally precluded petitioner from cross-examining alleged rape victim about possibility that she fabricated story because she feared jealous, abusive husband).

Moreover, to the extent Alexander's proffered evidence concerned Williams's bias or motivation in testifying, Judge Biester's rulings "fell within those 'reasonable limits' which a trial court, in due exercise of its discretion, has authority to establish." *Chandler,* 326 F.3d at 219. Judge Biester excluded the evidence under Pennsylvania's Rape Shield Law, 18 Pa. C.S.A. § 3104(a); Trial Ct. Op., at 7-10; 3/26/01 Mot. *in Limine Hrg. Tr.,* at 33-38.[19] Pennsylvania's interest in trial judges applying the Rape Shield Law is compelling: it prevents rape trials from sinking into inquisitions of victims' sexual history and practices. *See Commonwealth v. Killen,* 545 Pa. 127, 680 A.2d 851, 853 (1996); *see also Davis v. Alaska,* 415 U.S. 308, 319, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974) (weighing Alaska's interest in enforcement of law preserving anonymity of juvenile offenders). Furthermore, Judge Biester narrowly applied the Rape Shield Law by extending Alexander wide latitude.[20] He permitted Alexander to explore Williams's

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[19] In his supplemental objections, Alexander disagrees with Judge Biester's interpretation of Pennsylvania's Rape Shield Law. Supp. Obj., at 37. The Superior Court *didn't,* though, and it – not a federal court – is the final arbiter of Pennsylvania law. *See* Sup. Ct. Op., at 5.

[20] Alexander claims that, under the Confrontation Clause, "proving the complainant's communication to establish the accused's state of mind," Pet.'s Obj., at 22, is automatically admissible. He cites *Doe v. United States,* 666 F.2d 43 (4th Cir. 1981) and *United States v. Stamper,* 766 F.Supp. 1396 (W.D.N.C. 1999). His reliance on these cases is misplaced.

First, as a general matter, even if these cases had a direct bearing on Alexander's claim, they would not constitute "clearly established Federal law, as interpreted by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Second, these cases have no bearing on Alexander's claim. Rather than resting on the Confrontation Clause, *Doe* rested on Fed. R. Evid. 412. Under Rule 412 – *not the Confrontation Clause* – the Court of

(Continued on following page)

potential bias, her credibility, her intent to deceive, and even some of her sexual practices and predilections. *See* Trial Tr., at 139-240, 260-63.[21] Alexander himself concedes that "the jury had heard much about the complainant's practices and predilections: she claimed to have engaged in consensual sex of varying types; she admitted to having lied to and deceived her parents; and she admitted to having lied in an Internet advertisement precisely to

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Appeals for the Fourth Circuit held that an accused rapist's knowledge of "the victim's past sexual behavior is relevant" as to intent:

> The legislative history discloses that reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victims [sic] consent or her veracity. Privacy of Rape Victims: Hearings on H.R. 14666 and Other Bills Before the Subcomm. on Criminal Justice of the Committee on the Judiciary, 94th Cong., 2d Sess. 14-15, 45 (1976). There is no indication, however, that this evidence was intended to be excluded when offered solely to show the accused's state of mind. Therefore, its admission is governed by the Rules of Evidence dealing with relevancy in general.

666 F.2d at 48.

Stamper also does not stand for the proposition for which Alexander cites it. In *Stamper,* the United States District Court for the Western District of North Carolina held that, under the Confrontation Clause, the defendant was entitled to present bias evidence. 766 F.Supp. at 1407. Specifically, the court permitted the defendant to show that, in the past, the complainant had falsely accused three men of sexual abuse. *Id.* at 1397-99. Thus, rather than dealing with the extent to which the Confrontation Clause requires trial courts to admit evidence bearing an accused rapist's state of mind, *Stamper* – like the four cases Alexander principally relies on, *Davis, Olden, Wealot,* and *Redmond* – deals with bias evidence.

[21] To the extent the trial court's exclusion infringed upon Alexander's confrontation right, the error was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall,* 475 U.S. 673, 684, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986); *see also supra* pp. 14-18.

engage in a sexual relationship with an older man." Pet.'s Obj., at 19 n.8.

We now turn to Alexander's objection to Judge Wells's conclusion that his "right to present a defense" claim is procedurally defaulted. Alexander contends that Judge Biester breached his right to present a defense. Judge Wells concluded that Alexander never raised this claim in the Commonwealth's courts and, therefore, cannot do so here.

Alexander raised this claim before the Superior Court. In his brief, under STATEMENT OF SCOPE AND STANDARD OF REVIEW, he wrote, "Where the exclusion of evidence deprives an accused of the right *to present a defense,* or to confront witnesses, the matter is assessed applying principles of Due Process of Law and the rights ensured under the Confrontation Clause." Pet.'s Reply to Respondent's Answer to Writ of Habeas Corpus Relief ("Pet.'s Reply"), at 11 (emphasis added). Next, under STATEMENT OF QUESTIONS INVOLVED, Alexander wrote, "Appellant was deprived of the constitutional *rights* to confront witnesses *and to present critical defense evidence* by the rulings of the lower court and by trial counsel's ineffectiveness." *Id.* (emphasis added). Then, in the ARGUMENT section, he wrote, "The Admission of This Evidence Is Compelled by Precedent and Due Process Principles: The purpose of the Pennsylvania Rape Shield statute, and its interplay with the constitutional *due process right to present evidence* and confront witnesses, has been explicated by our Supreme Court. . . ." *Id.* (emphasis added).

The Superior Court confirmed that he raised this argument when it described his first claim: "Appellant was

deprived of the constitutional *rights* to confront witnesses *and to present critical defense evidence* by the rulings of the lower court and by trial counsel's ineffectiveness." Sup. Ct. Op., at 3 (emphasis added). Thus, Alexander adequately exhausted his state-court remedies.

We now consider his claim on the merits. The Sixth Amendment provides the accused in a criminal prosecution the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. To set forth a compulsory process violation, a defendant must make three showings:

> First, that he was deprived of the opportunity to present evidence in his favor; second, that the excluded testimony would have been material and favorable to his defense; and third, that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose.

Government of the Virgin Islands v. Mills, 956 F.2d 443, 446, 27 V.I. 353 (3d Cir. 1992) (citing *Rock v. Arkansas,* 483 U.S. 44, 56, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987)).

Judge Biester did prevent Alexander from presenting evidence that would have presumably been material and favorable to his defense. *Mills,* 956 F.2d at 446. Judge Biester precluded him from showing that Williams described herself online as "slightly experienced" and that she had sexual relations with another older man. The judge also barred him from showing that Williams chose him because, of the three men who responded to her online advertisement, he was the only one willing to accept her collect calls.

This does not end our inquiry, however. A court must last ask whether "the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." *Id.* Judge Biester had a legitimate evidentiary purpose. Pennsylvania's Rape Shield Law, at least in theory, prevents rape defendants from transforming trials of themselves into trials of their victims. *See Commonwealth v. Killen*, 545 Pa. 127, 680 A.2d 851, 853 (Pa. 1996). But that policy is furthered only when trial judges enforce it. Far from acting arbitrarily or disproportionately, Judge Biester performed his gatekeeping role fairly, balancing Alexander's right to defend himself against the Commonwealth's interest in protecting Williams's reputation. He permitted Alexander to explore Williams's potential bias, her credibility, her intent to deceive, and some of her sexual practices and predilections. *See* Trial Tr., at 139-240, 260-63. He also offered Alexander a fair compromise as to the "slightly experienced" advertisement: Alexander could introduce it if he would stipulate that Williams was inexperienced. Alexander elected to reject this middle path. 3/27/01 Trial Tr., at 248; 3/28/01 Trial Tr., at 79-80. Thus, his compulsory process claim fails.

Two final points are worth making here. First, because Alexander's compulsory process and Confrontation Clause claims are meritless, his correlative ineffective-assistance argument must fail. Counsel cannot be faulted for not advancing fruitless argument. *See Strickland v. Washington*, 466 U.S. U.S. 668, 688 (1984) ("The defendant must show that counsel's representation fell below an objective standard of reasonableness," meaning "reasonableness under prevailing professional norms").

Second, the Superior Court's failure to cite federal law when it addressed Alexander's compulsory process and

Confrontation claims is irrelevant. As noted earlier, the "state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparza*, 540 U.S. 12, 16, 157 L. Ed. 2d 263, 124 S. Ct. 7 (2003) (*per curiam*) (quoting *Early v. Packer*, 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002) (*per curiam*)). Here, the state courts properly balanced competing interests, forging a just result consistent with established federal law.

4. Petitioner objects to the Magistrate Judge's determination that his sentence is constitutional.

Alexander next claims that Judge Biester violated his Sixth Amendment right to have every element of the three offenses proved to the jury beyond a reasonable doubt.[22] *See Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). Specifically, he argues that Judge Biester failed *sua sponte* to use a special verdict form. This, he claims, led the jury to render an unconstitutionally ambiguous verdict.

As we highlighted above, the jury could have found that Alexander and Williams engaged in six sex acts. Judge Biester was under no duty to require it to delineate each. His use of a general verdict form was constitutional,

[22] For this claim, Alexander proceeds under 28 U.S.C. § 2254(b)(1)'s "contrary to" clause. Pet.'s Mem., at 44. In the Report and Recommendation, Judge Wells describes and evaluates the Superior Court's denial of this claim, concluding that, "Since ample testimony supports a finding of multiple sex acts, the verdict is properly supported." Rep. & Rec. at 26.

Alexander's claim is meritless, and we adopt Judge Wells's conclusion and reasoning. *See* Rep. & Rec., at 25-26. Furthermore, we refuse to hold counsel ineffective for never advancing a fruitless claim.

Alexander next argues[23] that the Information inadequately apprised him of the corrupting-a-minor charge:

> Petitioner was charged, by Information, with having corrupted the morals of a minor *by enticing her to engage in sexual intercourse.* Nonetheless, the trial court instructed the jury that it could consider, as proof of this offense, *any* event of *any* nature that might tend to corrupt the morals of a minor.

Pet.'s Obj., at 27. In other words, Alexander contends that, by defining the offense more broadly in the jury charge than the prosecution did in the Information, Judge Biester deprived him of due process.

To enable criminal defendants to prepare their defense, a state's charging method must fairly apprise them of the charges they face:

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[23] For this and the next claim, Alexander is entitled to *de novo* review. The Superior Court adopted the reasoning of the trial court on these issues, Sup. Ct. Op., at 5, but the trial court never addressed them.

Judge Wells counseled that we should deny both claims. For the first – that Judge Biester breached Alexander's due process rights by defining corruption of a minor more broadly than it was charged in the Information – she found that the instruction accurately described Pennsylvania law, and the disparity did not violate his rights. Rep. & Rec., at 26-29. We describe her treatment of the second in the text, *infra*.

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201, 92 L. Ed. 644, 68 S. Ct. 514 (1948). This requires that the state describe the offense with precision sufficient to notify the defendant of the specific charge against him. *Id. See also Bibby v. Tard,* 741 F.2d 26, 29 (3d Cir. 1984) (requiring, when defendant charged by indictment, "reasonable notice and information of the specific charge").

Alexander received adequate notice of the corrupting-a-minor charge. First, he complains that the sentence in the Information charging him with corrupting a minor alleged only that he "did entice a minor," but he omits the preceding sentence:

> In that the defendant, Raymond Alexander, did while being 18 years of age and upward, by *any act corrupts or tends to corrupt* the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime.

Information, at 2 (emphasis added). This sentence aligned with Judge Biester's definition of the offense.

Second, due process requires not that criminal defendants receive detailed outlines of the state's case, but notice adequate to prepare a defense. Here, the Information (1) named the offense, (2) cited the relevant statute, (3) identified Williams, (4) stated her age and Alexander's,

and (5) accused him of having "sexual intercourse" with her. This accusation gave Alexander sufficient notice to defend himself, rendering any disparity between the jury charge and Information harmless.

Alexander next argues that the jury charge defined corruption of a minor as an unconstitutional strict liability offense. But we must first address his objection to Judge Wells's conclusion that this claim is procedurally defaulted.

In Alexander's brief to the Superior Court, under STATEMENT OF MATTERS COMPLAINED OF ON APPEAL, Alexander described this claim:

> The trial court jury instruction on Corrupting the Morals of a Minor was deficient in a third aspect, one resulting in Constitutional error. The instruction permitted a conviction for conduct which occurred before defendant Alexander ever saw/met the complainant, and thus had no basis for even suspecting she might be a minor. To that extent, a conviction deprived petitioner of Due Process of Law, as there is no *mens rea* requirement and as the statute is therefore impermissibly overbroad.

Pet.'s Obj., at 28. The Superior Court itself confirmed that Alexander raised it:

> Alexander raises the following for our consideration: . . .
>
> 6. [Alexander] was deprived of due process of law, a fair trial and the effective assistance of counsel, when his jury was instructed that it could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when it was impossible for

> [Alexander] to know, or even suspect, that the complainant was less than 18 years old.

Sup. Ct. Op., at 4. Because Alexander raised this issue before the Superior Court, it is not procedurally defaulted, and we now consider it on the merits.

Alexander contends that Judge Biester defined corrupting a minor as an overbroad strict liability offense:

> The record confirms that when petitioner initially responded to the Internet advertisement placed by the complainant, it was impossible for him to discern her true age. As the telephone and Internet contact continued, and even as it became sexually explicit, this remained true – there was no indicator which could make any correspondent with Carrie Williams suspect that she might be underage. Nonetheless, the trial court instructed the jury that it could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when he was in Pennsylvania and Williams was in Kentucky, without regard for the fact that it was impossible for anyone to detect, or have grounds to suspect, that he was violating the law.

Pet.'s Obj., at 27-28.

We need not apply established federal law to this claim[24] because his premise – "there was no indicator which could make any correspondent with Carrie Williams

[24] This also permits us to avoid applying murky jurisprudence about the constitutionality of strict liability offenses. While the Supreme Court has suggested that procedural due process limits the extent to which courts may impose strict liability, it has never fleshed out this doctrine. *States v. Engler*, 806 F.2d 425, 434 (3d Cir. 1986).

suspect that she might be underage" – is flawed. On the contrary, the evidence strongly suggested that Alexander either knew or should have known that Williams was underage. *See supra* pp. 15-18 (explaining why the jury could have concluded Alexander knew or should have known Williams was underage). Among the multiple reasons we underscored earlier, Alexander (1) knew she was a high-school student living with her parents, 3/27/01 Trial Tr., at 105, 176-77; (2) demanded that she call him "Daddy," *id.* at 92, 115, 181; and (3) often called her "baby" or "little girl." *Id.* at 93.

5. Petitioner objects to the Magistrate Judge's determination that his counsel was effective when counsel failed to present character evidence or evidence supportive of his defense.

Alexander claims his lawyer erred in two ways. First, his lawyer failed to call three witnesses who would have testified that Alexander had a reputation for non-violence, *see* Pa. R. Evid. 404(a)(1). Second, he neglected to mitigate the damage wrought on his case by a "fantasy" email Alexander sent Williams. Alexander contends that defense counsel should have illuminated that he actually wrote the email for his thirty-two-year-old girlfriend a year before he first corresponded with Williams.[25]

[25] To establish ineffective assistance for not calling a character witness, the Superior Court required Alexander to prove (1) the witness existed; (2) the witness was available to testify; (3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; (4) the witness was prepared to cooperate and testify for defendant at trial; and (5) the absence of the testimony

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Beginning with his lawyer's failure to call three character witnesses, federal courts have never articulated any "specific paradigm for evaluating an attorney's failure to call certain witnesses other than the general standard of *Strickland*." *Clark v. Klem*, 2004 U.S. Dist. LEXIS 4621, Civ. No. 02-2850, 2004 WL 534038, at *5 (E.D.Pa. Mar. 10, 2004). As a general matter, whether to put a criminal defendant's character in issue is a classic tactical decision, one reviewing courts should refrain from second-guessing in all but the most egregious circumstances.

Defense counsel's decision constituted trial strategy that, at the time, was tactically prudent. The affidavits Alexander submitted demonstrate that his lawyer interviewed each potential witness. *See United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) ("While counsel is entitled to substantial deference with respect to strategic judgment, an attorney must investigate a case, when he has cause to do so, in order to provide minimally competent professional representation"); *see also* Pet.'s Ex. E (affidavits of the three potential witnesses, with each

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prejudiced defendant so as to deny him a fair trial. Sup. Ct. Op., at 10 (citing *Commonwealth v. Ervin*, 2000 PA Super 409, 766 A.2d 859, 865-66 (Pa.Super. 2000). It concluded that Alexander failed to prove the witnesses were available to testify, and, in any event, his lawyer had a good reason for not calling them because the prosecution then would have unveiled one or more of Alexander's four previous convictions. *Id.* at 10-12.

In her Report and Recommendation, Judge Wells found that the Superior Court's and *Strickland*'s tests are functionally equivalent. Rep. & Rec., at 32. She then concluded that counsel performed sufficiently because he "strategically decided not to call them to avoid potentially damaging cross-examination regarding Plaintiff's criminal record." *Id.*

attesting, "Mr. Fioravanti[26] was the only attorney who interviewed me regarding my testimony"). Thus, we know Alexander's counsel contemplated calling these people but elected not to.

Pennsylvania's Rules of Evidence demonstrate why counsel never called them. Under Pa. R. Evid. ("Rule") 404(a)(1) and Rule 405(a), a criminal defendant may offer reputation evidence about a pertinent character trait. But, by doing so, he "runs certain risks. . . ." *Commonwealth v. Ross,* 2004 Pa. Super. 269, 856 A.2d 93, 101 (Pa.Super. 2004) (quoting *Commonwealth v. Nellom,* 388 Pa. Super. 314, 565 A.2d 770, 775 (Pa.Super. 1989)). By putting his "character in issue," Alexander would have allowed the prosecution to present otherwise inadmissible, derogatory evidence. First, he would have permitted the prosecution to present its own anti-character witnesses. *See* Rule 404(a)(1); 1 West's Pa. Prac., Evidence § 404-3 (2d ed. 2004) ("Another consequence of putting character in issue is that the prosecution may call anti-character witnesses"). Second, while Alexander's witnesses would have been able to testify only about his reputation – by answering "what

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[26] In his supplemental objections, Alexander – for the first time, despite multiple previous filings – takes the Superior Court and Judge Wells to task because they had a "mistaken belief that Mr. Fioravanti was petitioner's trial counsel." Supp. Obj., at 60. *See also id.* at 63. Nothing before us indicates that Mr. Fioravanti and Alexander's other lawyer, Mr. Schneider, did not collaborate in representing him.

In fact, the record strongly suggests the contrary. Before Judge Biester, for example, Mr. Schneider said "I will be trying [the case.]" 3/26/01 Tr., at 10. Immediately after that, Mr. Fioravanti added, "I originally represented Mr. Alexander. I drafted that motion [*in limine*]. And I also have one other legal issue that will probably arise later on in the case which I have briefed." *Id.* at 11. Thus, the record indicates that Fioravanti and Schneider functioned together.

have you heard" questions – the prosecution would have been able to ask about "specific instances" of noncriminal misconduct. Rule 405(a). Third, the prosecution would have been able to attack each witness's foundation by asking its own "have you heard" questions. *See Commonwealth v. Fletcher,* 861 A.2d 898, 915-16 (Pa. 2004) ("[A] character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct by the defendant to test the accuracy of his or her testimony and the standard by which he or she measures reputation") (quoting *Commonwealth v. Busanet,* 572 Pa. 535, 817 A.2d 1060, 1069 (Pa. 2002), *cert. denied,* 540 U.S. 869, 157 L. Ed. 2d 126, 124 S. Ct. 192 (2003)). Most notably, it could have asked whether two of the witnesses – William Hutton and Patrick Kutzler – knew that a jury had convicted Alexander of risking catastrophe.[27]

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[27] Alexander argues that the prosecution would have been barred from probing into his prior convictions. We agree that the prosecution could not have inquired about his non-violent drug convictions in 1976, 1978, and 1980. We disagree as to the 1976 risking-a-catastrophe conviction because it bears on his propensity for violence.

His claim that remoteness would bar use of the prior conviction misses the mark. William Hutton and Patrick Kutzler knew Alexander when the jury convicted him, defeating any remoteness claim. *See Commonwealth v. Farrior,* 312 Pa. Super. 408, 458 A.2d 1356, 1361 (Pa.Super. 1983) (holding that prosecution could question two character witnesses about defendant's nineteen-year-old conviction because they knew him at the time). The third prospective witness – Lynn Hutton – did not know Alexander in 1976, but once the jury learned about this conviction, the damage would have been done – that the prosecution asked only two people, not three, would have been immaterial.

Last, the mere fact that the prosecutor, pretrial, said he would not introduce Alexander's "past criminal record," 3/26/01 Tr., at 6, does not mean the trial judge would have precluded him from impeaching the foundations of Alexander's character witnesses. Moreover, the prosecutor made this statement the day before trial, presumably after defense

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Turning to Alexander's second ineffectiveness argument, he claims that his lawyer should have demonstrated that he wrote the "fantasy" email a year before he corresponded with Williams. Alexander also claims defense counsel should have proved that he initially wrote it for his thirty-two-year-old girlfriend.

This claim also fails. Alexander mistakes the relevance of the "fantasy" email. In it, Alexander called his partner "little girl" six times.[28] In one line, for example, he

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counsel had already submitted his witness list, bereft of character witnesses.

[28] The entire email reads as follows, with each reference to "little girl" italicized:

> Here is the story . . .
>
> Wearing my favorite outfit (a little jewelry, a little perfume, little white socks), with your hair up, to expose every inch of your adoring gaze . . .
>
> Face down on my bed, hands and feet restrained to the four corners . . .
>
> The restraints are silk, so as not to hurt you, but they are secure . . .
>
> There is no escape until I release you from your bonds . . .
>
> Two pillows under your hips, to present you at the perfect angle . . .
>
> I'll put "the monster" in your cunt for a while, just to get you hot . . .
>
> But you know what is coming . . .
>
> My finger is working you [sic] asshole, wetting it, getting you loose . . .
>
> Every time I pull the monster from your pussy you wonder whether this is the time I will bury it in your ass . . .
>
> And after you're crying loudly, one of those times will be the one . . .

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You feel him entering you, stretching your tight little asshole . . .

Every muscle in your beautiful body tenses as you struggle against your bonds . . .

But there is no escape!! Your legs and hips tremble as I give you just the head . . .

It's such a thrill to watch your little ass swallow the monster's head!! Take another in [sic] or two . . .

Yes, *little girl,* you are really crying now . . .

Go ahead, cry louder . . .

No one can hear you!! Your *little girl* voice is begging the monster to cum in your ass . . .

And it's been so long and you're so tight that he can't resist . . .

Ohhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhhh . . .

Feel that liquid fire deep in your ass, *little girl* . . .

But I have a surprise for you! Your ass is so hot and tight and wet from my cum that the monster stays hard . . .

This time it's going to be a long, slow ass fucking . . .

One you will never forget!! As the minutes pass you're thrashing against the restraints . . .

Your *little girl* voice tells me your ass is cumming, knowing I love to hear that . . .

But I'm still pounding you . . .

Deeper, harder, faster, the monster is building to a frenzy . . .

You're saying everything and anything in your *little girl* voice, hoping I will relent . . .

But I'm still fucking that sweet little ass of yours . . .

And then it comes to you . . .

You know what to say that I won't be able to resist . . .

You promise me, in your best *little girl* voice, that you will come back again . . .

You know I am unable to resist you when you are coming back to(ward) me!!!'

(emphasis added).

wrote "No one can hear you!! Your little girl voice is begging the monster [Alexander's penis] to cum in your ass . . . " "Feel that liquid fire deep in your ass, little girl . . . " he wrote in another line. By calling his partner "little girl" over and over and then sending it to Williams, Alexander revealed his suspicion – or at the very least, desire – that Williams was exactly that, a little girl. Hence, the mere fact that he initially wrote the email for someone else, who was of age, is, to quote the Superior Court, "immaterial to the case." Sup. Ct. Op., at 10.

Thus, we cannot fault defense counsel for wanting as little stress on this highly inflammatory email as possible.

6. Petitioner objects to the Magistrate Judge's determination that certain claims are defaulted.

Alexander last objects to Judge Wells's conclusion that two of his claims were procedurally defaulted. He asserts that neither his "right to present a defense" claim nor "strict liability" claim were procedurally defaulted. We agree and, for the reasons articulated in Parts B.3 and B.4, sustain his procedural objections, nevertheless denying relief on the merits.

C. Conclusion

For the above reasons, we shall adopt and approve the Report and Recommendation, denying Alexander's petition. Because of the closeness of the closing argument question under *Moore,* we shall, as noted, issue a certificate of appealability.

ORDER

AND NOW, this 2nd day of February, 2005, upon consideration of Alexander's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (docket entry # 1), Alexander's memorandum in support of it (docket entry # 3), respondent's answer (docket entry # 6), Alexander's reply (docket entry # 7), the Report and Recommendation of Magistrate Judge Carol Sandra Moore Wells (docket entry # 9), Alexander's objections thereto (docket entry # 10), and Alexander's *pro se* supplemental objections, and for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that:

1. Alexander's objections are OVERRULED;

2. The Report and Recommendation of Magistrate Judge Carol Sandra Moore Wells is APPROVED and ADOPTED as supplemented by the foregoing Memorandum;

3. Alexander's petition for a writ of habeas corpus is DENIED;

4. Alexander having made a substantial showing of the denial of a constitutional right, we ISSUE a certificate of appealability, *see* 28 U.S.C. § 2253(c); and

5. The Clerk of Court shall CLOSE this case statistically.

BY THE COURT:

Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND ALEXANDER	:	CIVIL ACTION
Petitioner,	:	
v.	:	NO. 03-3514
ROBERT SHANNON, ET AL	:	
Respondents.	:	

REPORT AND RECOMMENDATION

CAROL SANDRA MOORE WELLS August 30, 2004
UNITED STATES MAGISTRATE JUDGE

Presently before this court is a Petition for Writ of Habeas Corpus filed, *pro se*, pursuant to 28 U.S.C. § 2254. Raymond Alexander ("Petitioner") currently is incarcerated at the State Correctional Institution at Frackville, Pennsylvania. Petitioner seeks habeas corpus relief based on alleged due process violations. The Honorable Stewart Dalzel referred this matter to the undersigned for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1). For reasons that follow, Petitioner's habeas petition should be denied without an evidentiary hearing.

I. BACKGROUND AND PROCEDURAL HISTORY[1]

The Superior Court of Pennsylvania summarized the facts of this case as follows:

[1] The facts contained in this section were gleaned from the Petition for Habeas Corpus, Amended Petition for Habeas Corpus, Memorandum in Support of Writ of Habeas Corpus, and the Commonwealth's response, inclusive of all exhibits thereto.

In the spring of 2000, [fifty-two-year-old Petitioner] responded to a personal advertizement placed on the Yahoo.com website by [CW]. At the time, [CW] was 15 years old and living in Kentucky. Over the next couple of months, the pair developed a relationship wherein they would engage in telephone and Internet "sex" and role-playing.

Throughout their relationship, [CW] represented that she was 18 but still living with her parents.

On May 5, 2000, [Petitioner] drove to Kentucky to meet [CW] in person. [Petitioner] picked up [CW] at the entrance of her development and drove to a nearby soccer field where the two fondled and kissed each other. Thereafter, [Petitioner] drove [CW] home before going back to his hotel. That evening, [CW] got into an argument with her parents and ran away from home. Using her mother's cellular phone, [CW] called [Petitioner] at his hotel and arranged to have him pick her up. When [Petitioner] arrived, [CW] showed him a fake identification card in an attempt to prove she was 18. At [Petitioner's] request, [CW] accompanied [Petitioner] back to Buck's County. Upon arriving at [Petitioner's] house, the two engaged in anal and oral intercourse.

[CW's] parents conducted a search of her belongings and discerned that she had been communicating with [Petitioner] and that he had been staying at a local hotel. Shortly thereafter, the Louisville Police Department contacted Corporal Getters of the Doylestown Police Department and apprised him of the situation. Corporal Getters, along with three other officers, proceeded to [Petitioner's] residence. Corporal Getters

> knocked on the door and asked [Petitioner] as to [CW's] whereabouts. [Petitioner] directed Corporal Getters to the bedroom where [CW] was then hiding. Corporal Getters arrested [Petitioner] for Interfering with the Custody of a Minor. In response, [Petitioner] stated, "She's 18. I have proof that she's 18." The police found [CW] in [Petitioner's] bedroom lying naked under the sheets and took her into protective custody.
>
> The Commonwealth charged [Petitioner] with the aforementioned crimes as well as two drug violations that were later severed for a separate trial. In this matter, [Petitioner] attempted to defend against the charges by demonstrating he was mistaken as to [CW's] age. A jury [on March 28, 2001] found [Petitioner] guilty of [Involuntary Deviate Sexual Intercourse], Statutory Sexual Assault and Corruption of a Minor.

Commonwealth v. Alexander, No. 2194 EDA 2001, Mem. Op. at 1-3 (Pa. Super. Apr. 25, 2002).

Petitioner was convicted by a jury on March 28, 2001. *See Commonwealth v. Alexander*, No. 6019/00 (Ct. Com. Pl. Bucks County, Oct. 10, 2001). On August 1, 2001, the Honorable Edward G. Biester, Jr., sentenced Petitioner to a period of incarceration of eight (8) to sixteen (16) years on the charge of Involuntary Deviate Sexual Intercourse ("IDSI") to be followed by twenty (20) years of state probation on all remaining charges. *See Commonwealth v. Alexander*, No. 6019/00, Op. at 3. Petitioner's IDSI conviction subjects him to the requirements of Pennsylvania's Megan Law. *Id. See* 42 Pa. C.S. § 9795. Petitioner filed a Motion for Reconsideration of Sentence and, by order dated August 13, 2001, his term of probation for the IDSI conviction was reduced to ten (10) years. *Id.* While all

other sentences were affirmed. *See Commonwealth v. Alexander*, No. 2194 EDA 2001 at 3.

In September 2001, on direct appeal to the Superior Court of Pennsylvania, Petitioner argued that he was deprived of his right to:

(1) confront witnesses and to present critical defense evidence by the rulings of the lower court and by trial counsel's ineffectiveness.

(2) a fair trial, and the effective assistance of counsel, when impermissible and false evidence was elicited from the complainant's parents, an error compounded by the failure to establish the falsity of the evidence and object to its use during closing argument

(3) a fair trial and the effective assistance of counsel, when trial counsel failed to adduce evidence of innocence [good character evidence] [sic] and evidence rebutting the prosecution case.

(4) a fair trial, and the effective assistance of counsel, when trial court permitted evidence of acts outside the limitations of the Information charging Corrupting the Morals of Minors, an error compounded by the trial court's charge that the jury could consider acts beyond the scope of the charging documents.

(5) a fair trial, and the effective assistance of counsel, by the numerous acts of prosecutorial misconduct made during closing arguments and counsel's failure to object thereto.

(6) a fair trial and the effective assistance of counsel, when his jury was instructed that it

> could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when it was impossible for [him] to know, or even suspect, that the complainant was less than 18 years old.

Id. at 3-4. He further contended that his sentence was illegal "because of merger required by an ambiguous verdict, and the failure of trial counsel to object to the same deprived [him] of the effective assistance of counsel." *Id.* at 4. On April 25, 2002, the Superior Court affirmed the conviction, *id.*, and the state Supreme Court denied *allocator* on September 27, 2002. *See* Respondent's Brief ("Resp.") at 2.

Respectively, on June 6, 2003 and June 10, 2003, Petitioner timely filed the instant Petition for *Writ* of Habeas Corpus and his Memorandum of Support ("Pet."). He raises, *inter alia*, the following five grounds:

> (A) The prosecutor's argument in his closing to the jury that an acquittal would be tantamount to a second rape amounted to misconduct. The prosecutor's "knowing use of false evidence, [which were] proved false by the prosecutor's own police investigation reports," also deprived Petitioner [sic] his constitutional rights, including the right to effective assistance of counsel.
>
> (B) Petitioner was denied his right to confront witnesses and the right to present a defense when the trial court refused to admit evidence of: (1) the victim's internet advertisement describing herself as "slightly experienced;" (2) the victim's relationship with another older man; and (3) the victim's receipt of at least three responses to her

advertisement and her decision to select Petitioner because he was the only one who was willing to accept collect telephone calls from her;

(C) The jury's verdict was ambiguous, thus rendering Petitioner's sentencing unconstitutional because the trial court impermissibly merged the charges;

(D) Petitioner's conviction on the Corruption of a Minor charge was unconstitutional in two respects: the jury instruction did not (1) limit the jury's consideration to the charge listed on the Criminal Information; and (2) allow for a defense of mistake of age;

(E) Trial counsel was ineffective for failing to present exculpatory evidence at trial, including failing to produce character witnesses who were available at trial, failing to prove that Petitioner's e-mail to the victim depicting sexual fantasy was written one year before Petitioner met the victim, and was written for and about a 32 year old woman.

See Pet. at 11-56. The Commonwealth counters, and this court finds, that Petitioner's habeas claims, all procedurally defaulted or meritless, should be denied and dismissed.

II. DISCUSSION

A. EXHAUSTION AND PROCEDURAL DEFAULT

A petition for habeas corpus is a final effort to obtain relief when other legal remedies are foreclosed. Therefore, a district court may consider and grant habeas corpus relief only if Petitioner meets his burden of proving that he

has either exhausted all state remedies available to him with respect to each discrete allegation or is excused from doing so. *See* 28 U.S.C. § 2254(b);[2] *see also Rose v. Lundy*, 455 U.S. 509, 519 (1982); *Toulson v. Beyer*, 987 F.2d 984, 987 (3rd Cir. 1993), *aff'd.* 30 F.3d 1488 (3rd Cir. 1994) (citations omitted). A claims exhausted if it has been "fairly presented" once to the state's trial court, intermediate appellate court, and highest court. 28 U.S.C. § 2254(b); *Evans v. Court of Common Pleas, Delaware County, Pennsylvania*, 959 F.2d 1227, 1230-31 (3rd Cir. 1992) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). The fair presentation requirement is met when the claim presented in the state court is the "substantial equivalent" of the claim asserted in the petitioner's federal habeas petition. *See Picard*, 404 U.S. at 278. *See also Lesko v. Owens*, 881 F.2d 44, 50 (3rd Cir. 1989) (citing *Picard*), *cert. denied* 110 S.Ct. 759 (1990); *Bisaccia v. Atty. Gen. of N.J.*, 623 F.2d 307, 310 (3rd Cir. 1980) (quoting *Picard*), *cert. denied*, 101 S.Ct. 622 (1980).

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[2] The exhaustion requirements of 28 U.S.C. § 2254 provide:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant . . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedures, the question presented.

When an issue is unexhausted and further direct or collateral review in state court is foreclosed,[3] the claim is deemed procedurally defaulted for purposes of federal review. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); 28 U.S.C. § 2254(b)(1)(A); 42 Pa.C.S. § 9544(a)-(c). This court will dismiss a procedurally defaulted claim unless Petitioner demonstrates both "cause" for the default *and* "actual prejudice" as a result of the alleged violation of federal law," or that the court's failure to consider the claims will result in a "fundamental miscarriage of justice."

"Cause" sufficient to excuse procedural default requires a showing that some objective factor, outside of counsel or Petitioner's control, prevented compliance with state procedural rules. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Caswell v. Ryan*, 953 F.2d 853, 862 (3rd Cir. 1992), *cert. denied*, 504 U.S. 944 (1992). "Actual prejudice" occurred if an error caused Petitioner "actual and substantial disadvantage." *U.S. v. Frady*, 456 U.S. 152, 170 (1972). The burden of proof falls on Petitioner to establish both cause for the default and prejudice resulting therefrom. *See Teague v. Lane*, 489 U.S. 288, 298 (1989);

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[3] Collateral attack pursuant to the Pennsylvania Collateral Relief Act ("PCRA"), 42 Pa.C.S. § 9541, *et seq.* requires that 1) a claim has not been previously litigated or waived *and* 2) the previous failure to raise the issue was not the result of any rational, strategic or tactical decision by counsel. 42 Pa.C.S. § 9543(a)(3)-(4). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue" or "it has been raised and decided in a proceeding collaterally attacking conviction or sentence." 42 Pa.C.S. § 9544(a)(2)-(3). An issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post conviction proceeding. 42 Pa.C.S. § 9544(b).

Coleman, 501 U.S. at 754; *Caswell*, 953 F.2d at 962. Fundamental injustice has been defined to encompass instances in which newly discovered evidence makes it "more likely than not" that a reasonable juror would find a petitioner not guilty. *See Coleman*, 501 U.S. at 750; *Sehlup v. Delo*, 513 U.S. 298 (1995); *see also Caswell*, 953 F.2d at 857.

B. EXHAUSTED CLAIMS

(1) STANDARD OF REVIEW

Petitioner has exhausted his claims of prosecutorial misconduct and this court will, therefore, determine these assignments of error on their merit. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal habeas court may overturn a state court's resolution of the merits of a constitutional issue only if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court of the United States, in *Williams v. Taylor*, 529 U.S. 362 (2000), discussed the analysis required by § 2254(d)(1):

> [Under the "contrary to" clause] a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions

> but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 1498. The Third Circuit Court, consistent with the *Williams v. Taylor* interpretation, has set forth in *Marino v. Superintendent, SCI-Albion*, 171 F.3d 877 (3rd Cir. 1999), *cert. denied* 528 U.S. 824 (1999) a two tier approach to determining § 2254(d)(1) issues:

> First, the federal habeas court must determine whether the state court decision was "contrary to" Supreme Court precedent that governs the petitioner's claim. Relief is appropriate only if the petitioner shows that "Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." *O'Brien [v. Dubois]*, 145 F.3d [16], 24-25 [(1st Cir. 1998]. In the absence of such a showing, the federal habeas court must ask whether the state court decision represents an "unreasonable application" of Supreme Court precedent; that is, whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified. If so, then the petition should be granted.

Id. at 891. The phrase "clearly established Federal law," as the term is used in Section 2254(d)(l), is restricted "to holdings, as opposed to the dicta of [the United States Supreme Court] decisions as of the time the relevant state-court decision." *Williams*, 529 U.S. at 365. Under the "reasonable application" clause,

> a federal habeas court may not grant relief simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law

> erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. The AEDPA further provides for relief if an adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d)(2). State factual determinations, presumptively correct, may be rebutted only upon presentation of clear and convincing evidence. *See* 28 U.S.C. § 2254(c)(1).

(2) PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT (PETITIONER'S GROUND A)

(a) "Victimization" of the complainant claim

Petitioner first argues that the prosecutor's comment in his closing argument that an acquittal would be tantamount to a second rape was improper and amounted to prosecutorial misconduct. *See* Pet. at 12. In his closing arguments, the prosecutor offered, and the court permitted, the following remarks which Petitioner finds offensive and prejudicial:

> *Mr. Gambardella*: . . . And, ladies and gentlemen, under the facts of this case and under the law, [CW] is not just a child of [her parents], she is our child who under the law must be protected. Because 15-year-old girls cannot, under the law, consent. We heard Mr. Schneider [the defense trial counsel] go on and on about her, and she's been dragged though the mud, she's been victimized by this man under the facts of this case, and they would like you to victimize her again.
>
> *Mr. Schneider*: Objected to.
>
> *The Court*: It's argument.

N.T. 3/28/01, 115-16. Petitioner argues that the prosecutor's comments "virtually mirro[r]" those condemned by the Third Circuit in *Moore v. Morton*, 255 F. 3d 95 (3rd Cir. 2001). *See* Pet. at 12-13. He further alleges that the Superior Court failed to cite "federal decisional law governing prosecutorial misconduct in closing argument, in reaching its decision." *Id.* at 15.

Rejecting Petitioner's arguments, the Superior Court determined that Petitioner failed "to demonstrate that the prosecution's comments had the unavoidable effect of forming in the jury's mind a fixed bias and hostility toward the defendant so that they could not weight the evidence objectively and render a true verdict." *Commonwealth v. Alexander*, No. 2194 at 13 (citing *Commonwealth v. Chmiel*, 777 A.2d 459, 466 (Pa. Super. 2001)).

When analyzing the prosecutor's alleged misconduct, this court must determine whether or not the prosecutor's actions "so infected the trial as to make the resulting conviction the result of a denial of due process." *See Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Smith v. Phillips*, 455 U.S. 209, 221 (1982). The due process analysis focuses not on the culpability of the prosecutor, but, rather, on the overall fairness of the trial. *See id.* at 219. "The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson*, 467 U.S. 504, 511 (1984). In evaluating whether alleged misconduct rose to the level of a constitutional violation, the court must examine the prosecutor's conduct in the context of the trial as a whole. *See Greer*, 483 U.S. at 766. Moreover, "a reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the

conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." *Moore*, 255 F.3d at 107.

In *Moore, supra*, a woman was viciously raped and robbed in her home. *See Moore*, 255 F.3d at 97. The victim, a Caucasian female, was assaulted in the dark and was not wearing her contact lenses. She required hypnotically enhanced memory to provide a composite sketch of her alleged attacker, Clarence Moore, an African-American man. *Id.* at 97-98. In his closing argument, the prosecutor made three statements which the Third Circuit deemed prejudicial, notwithstanding the trial court's curative instructions to the jury. The prosecutor first inferred that Moore, whose wife was Caucasian, had a proclivity for Caucasian women and, therefore, selected the victim because of her race. *Id.* at 99-100. Moore's counsel objected and moved for a mistrial arguing the reference to race was irrelevant, inflammatory, and prejudicial. *Id.* at 100. The trial court admonished the prosecutor at sidebar and issued a curative instruction to the jury.

Next, the prosecutor improperly argued that, Moore raped the victim because of "his greatest need for sexual release," because his wife had recently given birth and was suffering from mastitis "bleeding breasts." *Id.* at 100-101. The trial court, issued another curative instruction, informing the jury that the prosecutor had improperly inferred that Moore's wife's breast infection constituted motive to assault the victim. *Id.* at 101. Finally, the prosecutor offered the remark that Petitioner argues is analogous to his case:

> The last thing I have to say is that if you don't believe [the victim] and you think she's lying,

> then you've probably perpetrated a worse assault on her.

Id. at 101. Moore's counsel raised an objection and renewed his motion for a mistrial. *Id.* The trial court denied the motion, instructing the jury to disregard the prosecutor's "improper" remark. *Id.* at 101-02.

The Third Circuit reversed the district court's denial of Moore's petition for a *writ* of habeas corpus, finding the prosecutor's improper race-based arguments to be highly prejudicial and in derogation of his right to a fair trial. *See id.* at 120. The prosecutor's "selection" argument appealed to "biases against miscegenation and ugly stereotypes . . . [and such] [r]acially or ethnically based prosecutorial arguments have no place in our system of justice." *Id.* at 113 (citing *McCleskey v. Kemp*, 481 U.S. 279, 309-10, 107 S. Ct. 1756, *reh'g denied*, 482 U.S. 920, 107 S.Ct. 3199 (1987)). The prosecutor's "sexual release" argument, also improper, was deemed adequately remedied by the trial court's curative instruction. *Id.* at 116. Furthermore, the Court held that the prosecutor's, equally prejudicial, comment that the jury would commit "a worse assault on [the victim]," amounted to "an improper appeal to the jurors' passions." *Id.* at 117. The Court noted that while this remark, standing alone, could be cured "with strong instructions like those the trial judge issued here . . . when viewed in light of the prosecutor's 'selection' argument, we believe that due process concerns are implicated" and concluded that "[t]ogether, the prosecutor's 'selection' argument and the 'perpetrating worse assault' argument were not only improper but prejudicial." *Id.* at 118.

Petitioner argues that the prosecutor's comments, similar to those condemned in *Moore*, prejudiced the jury and violated his due process rights. *See* Pet. at 11-13. He further complains that, in evaluating his federal claims of prosecutorial misconduct, the Superior Court inappropriately relied upon state precedent, *Commonwealth v. Chmiel*, 777 A.2d 459, rather than applicable United States Supreme Court jurisprudence. *See Commonwealth v. Alexander*, No. 2194 at 13. Respondents reply that the prosecutor's comments were appropriate, considering the "brutal tactics of an unrelenting, confused, immature fifteen-year-old girl" and that the "cold transcript does not provide this [court] with the sneers and contemptuous tones of defense counsel that the jury and trial counsel heard while defense counsel was cross-examining the girl." Resp. at 10.

This court finds Petitioner's reliance on *Moore* unconvincing. Under AEDPA, this court's review is limited: it is not assessing whether this court would independently determine the misconduct to have been prejudicial, but whether the state court's review applied appropriate United States Supreme precedent reasonably. *See Marshall v. Hendricks*, 307 F.3d 36, 63 (3rd Cir. 2002). Although Petitioner is correct in his argument that the prosecutor's "victimization" appeal was a direct attempt to arouse the jury's passions, it is not analogous to the facts in *Moore*. This court interprets *Moore* "as establishing the principle that the stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker." *Marshall v. Hendricks*, 307 F.3d 36, 73 (3rd Cir. 2002) (citing *Moore*, 255 F.3d 95,

119). The prosecutor's comments, viewed in light of the entire trial and the severity of the crime, coupled with the curative instructions and weight of the evidence against Petitioner, did not unfairly taint the verdict. *See Moore*, 255 F.3d at 107.

The Third Circuit's finding of a denial of a due process violation in *Moore* was premised on the combined effect of three prejudicial prosecutorial comments "in the context of the entire trial and in view of all the evidence." *See Moore*, 255 F.3d at 118. The United States Supreme Court has recognized that closing statements often involve improvisation on the part of prosecutors, and, while this does not excuse prosecutorial misconduct, it "does suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. 637, 647.

While this court does not condone the prosecutor's comment, it finds that the Superior Court was reasonable in analyzing the impact of the conduct on the "totality of the trial." *See Marshall*, 307 F.3d at 67. Hence, the state court's decision herein did not result in a decision that was "contrary to" or "involve[d] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." *See* 28 U.S.C. § 2254(d).

(b) "False evidence" claim

Petitioner claims the prosecutor knowingly made use of false evidence, thus committing a second "egregious and unconstitutional error . . . to secure a conviction." Pet. at 17. Furthermore, trial counsel was ineffective for failing to

(1) "use the police report in cross-examination . . . and (2) to object to the prosecutor's use of the father's false testimony in closing arguments;" thus, violating his due process rights by "securing a conviction by knowing use of perjured testimony, evinced by the prosecutor's failure to correct the father's false testimony and the prosecutor's subsequent affirmative use of this evidence as core proof of guilt." Pet. at 21.

United States Supreme Court and Third Circuit cases draw a distinction between prosecutorial misconduct that "because of its capacity to divert the trier of fact from the task before it, so undermines the reliability of a verdict that it constitutes a due process violation," *Berger v. United States*, 295 U.S. 78, 85-88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212, 4 L.Ed. 2d 252, 80 S.Ct. 270 (1960); *Marshall*, 307 F.3d at 63, and misconduct that implicates a specific right guaranteed by the Constitution, such as, a violation of right to counsel, guaranteed by the Sixth Amendment to the United States Constitution as herein alleged (*See* discussion in section B(2)(b), *infra*. Thus, the United States Supreme Court will presume a due process violation when prosecutorial misconduct violates a specific right guaranteed by the Bill of Rights. *See Marshall*, 307 F.3d at 70 (citing *Griffin v. California*, 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965); *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S.Ct. 2240 (1976); *Hassine v. Zimmerman*, 160 F.3d 941 (3rd Cir. 1998)).

For example, a presumptive due process violation occurred where a prosecutor asked the jury to infer a defendant's guilt based on his decision to remain silent, because the Fifth Amendment was implicated. *See Marshall*, 307 F.3d at 70-71 (citing *Griffin v. California, supra;*

Doyle v. Ohio, supra). The Third Circuit extends this presumption to "other enumerated rights." *Id.* (citing *United States v. Thaame*, 846 F.2d 200 (3rd Cir. 1988); *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir. 1973), *cert. denied*, 414 U.S. 855, 38 L.Ed. 2d 104, 94 S.Ct. 154 (1973). Furthermore, while some federal courts of appeal have restricted their review under AEDPA to decisions of the United States Supreme Court only, the Third Circuit has deemed "decisions of federal courts below the level of the United States Supreme Court . . . helpful to us in ascertaining the reasonableness of state courts' application of clearly established United States Supreme Court precedent, as well as 'helpful implications' of that precedent." *Marshall*, 307 F.3d at 71 (quoting *Moore*, 255 F.3d at 105, citing *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3rd Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 824, 145 L.Ed. 2d 62, 120 S.Ct. 73 (1999)).

Initially this court determines if the alleged misconduct diverted the jury from its task and "so undermine[d] the reliability of a verdict that it constitutes a due process violation." *Marshall*, 307 F.3d at 63. Petitioner argues that the prosecutor "knowing[ly] use[d] . . . perjured testimony." Pet. at 21. Petitioner complains that the victim's father, John Williams, provided a false area code to the hotel where Petitioner stayed in Kentucky. *See N.T.* 3/27/01, 67.[4] In his closing, the prosecutor argued:

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[4] The exchange during direct examination of Mr. Williams was as follows:

Q: Okay. The hotel showed you the information, however; is that correct?

A: They did.

(Continued on following page)

> [Petitioner] wanted her so bad that he put a fake or a false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to talk about deception? . . .

N.T. 3/28/01, 122. Petitioner posits that the prosecutor made this argument to depict Petitioner as dishonest and culpable. *See* Pet. at 18. Corporal Daniel T. Getters, of the Doylestown Township Police, however, wrote in his police report that Petitioner had registered at the Fairfield Inn in Louisville Kentucky using a (215) area code. *See* Pet. at Exhibit C.

The Superior Court found no due process violation based on this issue, stating:

> Initially, we observe that the offending testimony was merely a recollection of events leading to [Petitioner's] identification and apprehension.

Q: Did they also show you his phone number:

A: As part of the registration card a phone number was on there. What I recognized was not the area code, the area code was different but the last seven digits were very familiar from what we had in our home. I remember calling my wife and I asked her to repeat the last seven digits. And there was an identical match on the last seven digits.

Q: Just so I'm clear, the last seven digits of the telephone number on the registration card at the hotel matched the last seven digits of this piece of paper that you and your wife had pieced together that was ripped up in [the victim's] room; is that correct?

A: That's correct.

Q: The registration card at the hotel, did that have a 215 area code in it?

A: No it did not.

Q: It had some other numbers?

A: Yes.

N.T. 3/27/01, 66-67.

Whether the proffered testimony was false is a question left in the hands of the jury. *See Commonwealth v. Yaninas*, 722 A.2d 187, 189 (Pa. Super. 1999) (stating "[t]he jury, as the finder of fact, is free to believe all, some, or none of the testimony presented to it"). Accordingly, we are precluded from accepting [Petitioner's] premise that such testimony was false.

With respect to the prosecutor's reference to the "false area code" in his closing remarks, it is well established that a prosecutor, just as a defense attorney, must have reasonable latitude in presenting a case to the jury and must be free to present his or her argument with logical force and vigor. *See Commonwealth v. Chmiel*, [777 A.2d 459, 466]. The prosecutor's closing remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the testimony. *See id.* Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. *See id.*

* * *

In light of the testimony offered by [the victim's] father, we conclude that the prosecution's reference to the "fake area code merely raised a legitimate inference of deception based upon properly admitted evidence and thus the prosecutor did not engage in misconduct. Therefore, we conclude that [Petitioner] failed to demonstrate reversible error. *See Chmiel*, 777 A.2d at 466. Further, because the prosecution was permitted to refer to properly admitted evidence in

> his closing remarks, defense counsel had a reasonable basis not to object.

Commonwealth v. Alexander, No. 2194 at 8-9. Petitioner argues that, in addressing this claim, the Superior Court "effectively omitted [Corporal Getter's report] from its analysis." Pet. at 20. Petitioner is incorrect inasmuch as the Superior Court refers directly to the officer's report. *See Commonwealth v. Alexander*, No. 2194 at 7.[5]

Petitioner's reliance on *Donnelly v. DeChristoforo*, 416 U.S. 637, and *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967) is misplaced. In *Donnelly*, the United States Supreme Court, discussing it's earlier decision in *Miller*, stated:

> In *Miller v. Pate*, the principal case relied upon, this Court held that a state prisoner was entitled to federal habeas relief upon a showing that a pair of stained undershorts, allegedly belonging to the prisoner and repeatedly described by the

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[5] The Superior Court summarized Plaintiff's arguments as follows:

> [Petitioner] . . . posits that because trial counsel failed to object to the prosecutor's conduct, he rendered IAC [ineffective assistance of counsel]. Specifically, [CW's] father (Father) testified that when he went to [Petitioner's] hotel in Kentucky, the area code provided on the registration card was false. This was based on the fact that the area code did not match the one Father found among [CW's] belongings. [Petitioner] directs us to a police report Corporal Getters prepared after [Petitioner's] arrest indicating that [Petitioner] had in fact provided the area code. [Petitioner] insists that not only did the prosecution present false testimony but also erroneously referenced such testimony in his closing remarks.

Commonwealth v. Alexander, No. 2194 at 7 (internal references omitted).

> State during trial as stained with blood, was in fact stained with paint.

Donnelly, 416 U.S. at 646. The prosecution in *Miller*, proliferated and exploited a known inaccuracy. *Id.* No *Miller* type deception transpired in the case at bar. Rather, a remark by the prosecutor was forwarded to the jury as a matter of opinion. Therefore, this court finds that the state court's determination of the misconduct challenge, fully elaborated and analyzed, was neither contrary to, nor an unreasonable application of, any federal Supreme Court precedent.

(c) Allegation of harmful error

Petitioner avers that the prosecutor's statements prejudiced the trial and rendered it unfair and that there is a reasonable probability that this error was palpable and outcome-determinative. *See* Pet. at 17, 21-22. Petitioner misstates the applicable standard of review. A harmless error inquiry is triggered only if a constitutional error did occur. *See e.g., Darden v. Wainwright*, 477 U.S. 168, 182 n.15, 106 S. Ct. 2464 (1986); *Marshall*, 307 F.3d at 67. This court, finding no constitutional violation, need not engage in a harmless error analysis.

(d) Sixth Amendment denial of ineffective assistance of counsel claim

(i) *Strickland* Standard

Petitioner asserts a prosecutorial misconduct claim that implicates his Sixth Amendment right to counsel. To prevail on his claim, Petitioner must satisfy the two-pronged federal constitutional standard established in

Strickland v. Washington, 466 U.S. 668 (1984). *See Hess v. Mazurkiewicz*, 135 F.3d 905 (3rd Cir. 1998). First, Petitioner must demonstrate that counsel's performance was so deficient as to fall below an objective standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed petitioner by the Sixth Amendment. In assessing an attorney's performance, every effort must be made "to eliminate the distorting effects of hindsight," reconstruct the circumstances of counsel's conduct and evaluate the conduct from counsel's perspective at the time. *Id.* at 689. This court indulges a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *See id.* In other words, Petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id.* (citing *Michel v. La.*, 350 U.S. 91, 101 (1955)). After having adequately established that counsel's performance was constitutionally deficient, Petitioner must further show that the deficient representation prejudiced the defense. If Petitioner fails to satisfy either prong of the *Strickland* standard, his claim necessarily fails, rendering inquiry into the remaining prong unnecessary. *See Strickland*, 466 U.S. at 697.

(ii) Defense counsel's failure to use police report durine cross-examination and to object to the prosecutor's summation

Petitioner faults trial counsel for not having used Corporal Getter's report during his cross-examination

(presumably of John Williams, the victim's father), and for not objecting to the prosecutor's reference to the "false area code." *See* Pet. at 19, 21. In reviewing these claims, the Superior Court determined that John Williams' testimony "was merely a recollection of events leading to [Petitioner's] identification and apprehension," and that the jury "as the finder of fact, [was] free to believe all, some, or none of the testimony presented to it." *Commonwealth v. Alexander*, No. 2194 at 8 (quoting *Commonwealth v. Yaninas*, 722 A.2d at 189). Turning to Petitioner's claims of ineffective assistance of counsel with respect to trial counsel's failure to object to the prosecution's reference to the "fake or false area code," the Superior Court held that, "because the prosecution was permitted to refer to properly admitted evidence in his closing remarks, defense counsel had a reasonable basis not to object . . . [t]herefore, we conclude that counsel did not render [ineffective assistance of counsel]." *Id.* at 9.

Under *Strickland*, courts should be "highly deferential" to counsel's reasonable strategic decisions and guard against the temptation to engage in hindsight. *See Marshall*, 307 F.3d at 85 (citing *Strickland*, 466 U.S. at 689-90). Moreover, in order to analyze an ineffective assistance of counsel claim properly, this court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. This court finds that the Superior Court was not unreasonable in determining that Petitioner's trial counsel was not ineffective in his decision to not cross-examine John Williams, the victim's father, on the issue of the area code, or to object to the prosecutor's reference to his testimony. Under the first prong of *Strickland*, counsel's decision did not fall below professional expectations. Strategic considerations likely constrained

trial counsel from cross-examining a distraught father or calling attention, a second time, to the prosecutor's reference to John Williams' testimony in his closing argument. Also, the record does not suggest that the prosecutor knowingly elicited and used false testimony. Moreover, in a case where overwhelming evidence of statutory rape existed, any misstatement by John Williams or the prosecutor could not have reasonably affected the outcome of the trial. Since Petitioner cannot satisfy either prong of *Strickland*, his ineffective assistance of counsel claim is without merit and must be dismissed.

(3) Allegation of Denial of Right of Confrontation (Petitioner's Ground B)

(a) Allegation of trial court error

Petitioner contends that his Sixth Amendment right to confront witnesses, was violated when the trial court precluded the introduction of three pieces of evidence material to his mistake of age defense.[6] Precluded evidence would have established that:

1. [The victim], in her advertisement on the Internet, described herself as "slightly experienced;"

2. [The victim] had a relationship with another older man approximately one year before

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[6] 18 Pa.C.S. § 3102 provides, in pertinent part:

When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

> she initiated her advertisement and met [P]etitioner; and
>
> 3. [The victim] received at least, three (3) responses to her advertisement, and she selected [P]etitioner because he was the only one who would accept collect telephone calls from her.

Pet. at 23-24. Petitioner argues that "each exclusion deprived [him] of various federal constitutional rights, in particular, the right to confront witnesses and the distinct right to present his defense." *Id.* at 24. Petitioner's related due process allegations are discussed in Section C(2); *supra*; his charge of trial court error is analyzed in Section C(3); *supra*.

Petitioner states that the Superior Court's analysis of his right to confront witnesses claim "is contrary to and/or an unreasonable application of, the decisional law of the United States Supreme Court." Pet. at 24. Respondents defend that the trial court excluded evidence "plainly barred from the proceedings by Pennsylvania's Rape Shield law," Resp. at 13, which provides:

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S.§ 3104(a). The purpose of the Rape Shield Law appropriately prevents a sexual assault trial from

degenerating into an attack upon the victim's reputation and chastity. *See Commonwealth v. Weber*, 549 Pa. 430, 701 A.2d 531 (1997) (stating, "[b]y excluding from trial evidence of the victim's past sexual contact, the possibility of confusion and prejudice is thus minimalized"); *Commonwealth v. Wall*, 413 Pa. Super. 599, 606 A.2d 449, 455 (1992). Moreover, rape shield laws, by protecting victims of sexual assault, encourage the reporting of what has traditionally been an under-reported crime. *See generally* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 263 (1986).

All three pieces of evidence that Petitioner attempted to admit into evidence directly address the victim's prior sexual conduct and, therefore, were properly excluded at trial. The trial court carefully analyzed Petitioner's Sixth Amendment confrontation clause:

> Although the only specific exception contained in the statute is the admission of prior consensual activity with the accused, other exceptions have been carved out by our appellate courts to accommodate an accused's right under the Confrontation Clause of the Sixth Amendment to the United States Constitution to confront and cross-examine witness against him/her. *Commonwealth v. Guy*, 454 Pa. Super. 582, 686 A.2d 397 (1996). Generally, evidence tending to directly exculpate the accused by showing that the alleged victim is biased and has a motive to lie, fabricate, or seek retribution is admissible at trial. *Id.* When determining whether evidence of a complainants's sexual history may be introduced, a trial court must consider: (1) if the evidence sought to be admitted is relevant to the accused's defense, (2) whether the evidence

> sought to be admitted is merely cumulative of evidence otherwise admissible at trial, and (3) whether the evidence which the accused wishes to introduce at trial is more probative than prejudicial. *Commonwealth v. Fernsler*, 715 A.2d 435, 439-440 (Pa. Super. 1998).

Commonwealth v. Alexander, No. 6019 at 8-9 (Ct C.P. Pa. Oct. 10, 2001). The trial court proceeded to apply these factors to Petitioner's case:

> In this case, prior to trial, [Petitioner] filed a Motion in Limine in which he sought to introduce evidence regarding a prior relationship the complainant had in February of 1999 with an older man. Further [Petitioner] sought to introduce evidence that C.W.'s previous relationship was exposed by her father. [Petitioner] asserts that this evidence was relevant to show that C.W. was motivated to pres [sic] the charges against [Petitioner] to deflect blame from herself. [Petitioner] also contends that this evidence was material to the defense of mistake of age as it demonstrates C.W.'s past history of soliciting and deceiving older men.
>
> Here, is apparent from the testimony adduced at trial that the introduction of this evidence would only distract from the legitimate issues involved in the case and seek to harass the complainant. The record clearly demonstrates that C.W. was not pursuing the charges merely to seek retribution against [Petitioner] and to deflect blame from herself C.W. testified candidly that she willingly participated in the sexual acts with [Petitioner] and that she misrepresented her age in order to do so. C.W. also admitted that prior to meeting [Petitioner] she was seeking to have a

relationship with an older man. Thus, evidence concerning C.W.'s past sexual conduct or sexual preference was irrelevant to the central issue before the jury, i.e., whether [Petitioner] reasonably believed C.W. to be 18, and more prejudicial than probative. Most significantly, [Petitioner] was not prohibited from cross-examining the complainant regarding her desire to have a relationship with an older man or the fact that she lied to [Petitioner] about her age.

Likewise, under the facts of the instant case, any statement that C.W. made concerning her level of sexual experience on the internet were properly precluded as irrelevant and prejudicial since they were closely tied to the issue of C.W.'s chastity and sexual preference. Significantly, the record reflects that this Court's offer to show, by stipulation, that C.W.'s statements concerning her level of experience were false was declined by counsel. Counsel's decision to decline the stipulation demonstrates that it was defense counsel's motivation not to show C.W.'s deception, but to pierce the rape shield statute.

Finally, [Petitioner] argues that this Court erred in precluding evidence of the number of responses the complainant received to her internet advertisement and that she had chosen [Petitioner] from among the numerous responses because he was the only one who would accept her collect calls.

C.W. testified extensively concerning the placement of her internet advertisement. She admitted during both direct and cross-examination that she requested that she call [Petitioner] collect and that the two had made calling arrangements. C.W. further admitted that her purpose in

> placing the internet advertisement was to meet an older man. With regard to the responses to C.W.'s internet ad, none of the respondents was called to testify at trial. Any testimony concerning their out-of-court statement would have been hearsay which is not within any hearsay exception.

Id. at 9-10 (citations omitted).

The Superior Court adopted the trial court's Rule 1925(a)[7] opinion, also finding Petitioner's contention to lack merit. *See Commonwealth v. Alexander*, No. 2194 at 5. This court finds no state court error in balancing competing interests. Moreover, no constitutional right was implicated by the suppression of these facts. Accordingly, the state courts' decision was neither "contrary to, nor involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d).

(b) Denial of the effective assistance of counsel claim

Petitioner further alleges that the exclusion of the three statements relating to the victim's past sexual conduct "was occasioned or facilitated by his own counsel, thereby depriving [him] of his constitutional guarantee to

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[7] Pa. R. App. P. 1925(a) provides as follows:

> General rule. Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons maybe found.

effective assistance." Pet. at 24. Prior to trial, Petitioner's counsel in a Motion *in Limine,* sought admission of evidence regarding the victim's supposed prior relationship with an older man in February 1999 (approximately one year before her encounter with Petitioner). *See* Pet. at 5; *Commonwealth v. Alexander,* No. 6019 at 9. Petitioner also sought to demonstrate that it was only after the victim's father uncovered her relationship with Petitioner, that the victim pressed charges against Petitioner in order to deflect blame from herself. *See Commonwealth v. Alexander,* No. 6019 at 9. Petitioner argued that this evidence was material to his defense of mistake of age as it demonstrates the victim's history of soliciting and deceiving older men. *See id.* Petitioner further avers that this evidence shows that the victim confused factual occurrences of the alleged prior relationship with those involved in the instant case. *See* Pet. at 5. The trial court opined that the introduction of evidence concerning the victim's sexual experience and internet advertisement "were properly precluded as irrelevant and prejudicial since they were closely tied to the issue of [the victim's] chastity and sexual preference." *Commonwealth v. Alexander,* No. 6019 at 10. Moreover, evidence of the victim's prior relationship "would only distract from the legitimate issues involved in the case and seek[s] to harass the complainant" and . . . "was irrelevant to the central issue before the jury, i.e., whether [Petitioner] reasonably believed [the victim] to be 18, and more prejudicial than probative." *Id.* at 9-10. Finally, the trial court determined that information relating to the number of responses the victim received to her advertisement and her selection of Petitioner, because he was the only one who would accept her calls, was irrelevant inasmuch as the victim freely admitted, during both direct and cross-examination, that the purpose for

her advertisement was to meet an older man, and that Petitioner had agreed to their calling arrangement. *Id.* at 10.

Since suppression of this evidence did not unfairly prejudice Petitioner, counsel was not ineffective in failing to have it admitted. Hence, I do not find the state court's evidentiary rulings to violate any relevant Supreme Court precedent.

(4) Unconstitutional Sentence and Ineffective Assistance of Counsel Claims (Petitioner's Ground C)

Petitioner argues that the jury rendered an ambiguous verdict. The trial court failed to use a special verdict form to define and delineate the charges of Involuntary Deviate Sexual Intercourse and Statutory Assault, hence, the jury's verdict failed to indicate the number and type of penetration (vaginal, oral, and/or anal) that had occurred. *See* Pet. at 41-42. Petitioner presumes that because the verdict did not explicitly state a finding of more than one culpable act, "there is no proof that the jury found more than a single act." *Id.* at 42. Petitioner correctly states that "where the jury charge is ambiguous, the verdict may not be read as supporting a conviction of a greater offense." *Id.* Petitioner denounces the Superior Court's failure to examine "the language of the jury instructions or of the principles of [*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2423, 153 L.Ed. 2d 556 (2002)] requiring an explicit jury determination of the elements of each crime for which the accused is punished." *Id.* at 44 (alterations omitted).

The state court handles Petitioner's complaint about the jury charge as follows:

> [Petitioner] presumes that because the verdict does not reveal the jury's finding with respect to how many times he and [the victim] had intercourse, it found that only one act occurred. This, however, is an impermissible presumption. *See* [*Commonwealth v. Anderson*, 550 A.2d 807, 809 (Pa. Super. 1988)]. A review of the trial transcript demonstrates that the jury could have found that [Petitioner] engaged in several felonious acts of intercourse with [the victim] and convicted him separately of each. Specifically, [the victim's] testimony indicates that the couple had two sexual encounters while at [Petitioner's] home. The first encounter consisted of oral and anal sex in [Petitioner's] bedroom. [The victim] then stated that [Petitioner] got dressed and watched television. The couple later returned to the bedroom and again had oral sex. Without speculating on the jury's deliberation, it is certainly possible that the jury found the couple had two separate sexual encounters and rendered a verdict reflecting that finding. We conclude that such a possibility precludes a discussion with respect to merger, and therefore, [Petitioner's] claim is without merit.

Commonwealth v. Alexander, No. 2194 at 14-15 (citations to trial transcript omitted). As noted by the Superior Court, when a general verdict is rendered, the law requires "only that there be sufficient evidence to support the convictions that the jury has returned." *Id.* at 14 (citing *Anderson,* 550 A.2d at 809). Since ample testimony supports a finding of multiple sex acts, the verdict is properly supported. Hence, this decision, neither contrary

to, nor an unreasonable application of, clearly established Supreme Court precedent, requires affirmance. Moreover, counsel cannot be held ineffective for failing to litigate a meritless claim. *See Strickland,* 466 U.S. at 686.

(5) DUE PROCESS CLAIMS (PETITIONER'S GROUND D)

Petitioner says two errors invalidate his conviction for Corruption of the Morals of a Minor:

> (1) Petitioner was charged, by Information, with having corrupted the morals of a minor *by enticing her to engage in sexual intercourse.* Nonetheless, the trial court instructed the jury that it could consider, as proof of this offense, *any* event of *any* nature that might tend to corrupt the morals of a minor;
>
> (2) The record confirms that when [P]etitioner initially responded to the Internet advertisement placed by the complainant, it was *impossible* for him to discern her true age. As the telephone and Internet contact continued, and even as it became sexually explicit, this remained true – there was no indicator which could make any correspond[ence] with [the victim] suspect that she might be underage. Nonetheless, the trial court instructed the jury that it could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when he was in Pennsylvania and [the victim] was in Kentucky, without regard for the fact that it was impossible for anyone to detect, or have grounds to suspect, that he was violating the law. This deprived [P]etitioner of Due Process, under both the United

> States and Pennsylvania Constitutions, a claim nowhere addressed in the lower court [o]pinions.

Pet. at 47-48 (emphasis in original). Petitioner argues that, because the state courts did not address his claims, *de novo* review by this court is warranted. *Id.* at 49-50. In support of his assignments of error, Petitioner relies upon *Commonwealth v. Anderson,* 550 A.2d 807, stating, "[t]he irony here is that the Superior Court [in *Anderson*] has accepted [his] contention and strictly limited convictions to cases where the prosecution proves the act specified in the Information (regardless of what other crimes are proved at trial)." Pet. at 50. He goes on to argue that "it is impossible to ascertain whether the jury found that the corrupting occurred by the means charged in the Information . . . or by any other means." *Id.* Petitioner's arguments are flawed in several respects.

State trial jury instructions are reviewable by a federal court only if they violate specific constitutional standards imposed upon the states by the due process clause of the Fourteenth Amendment. *See Wheeler v. Chesny,* C. A. No. 98-5131, 2000 U.S. Dist. LEXIS 813, (E.D. Pa. Jan. 27, 2000); *Hallowell v. Keve,* 555 F.2d 103, 106 (3rd Cir. 1977). The test "is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten,* 414 U.S. 141, 147, 38 L. Ed. 2d 368 (1973). Moreover, in assessing the effect of a challenged jury instruction, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde v. California,* 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct.

1190 (1990); *Boyd v. United States,* 271 U.S. 104, 107, 70 L. Ed. 857, 46 S. Ct. 442 (1926)). The United States Supreme Court has further instructed that when evaluating the adequacy of a jury instruction, the instruction must be read in its entirety, not in isolated fragments. *See Victor v. Nebraska,* 511 U.S. 1, 5, 127 L. Ed. 2d 583, 114 S. Ct. 1239 (1994).

Petitioner's reliance on *Commonwealth v. Anderson,* 550 A.2d 807, is erroneous. In *Anderson,* the Commonwealth appealed Anderson's acquittal on two counts of indecent assault based upon identical acts, performed on the same victims, underlying the Corruption of Minors charges. *See Anderson,* 550 A.2d at 807. In post-trial motions before the trial court, Anderson argued that, because the underlying acts forming the basis of the Corruption of Minors charges were the predicate acts underlying the indecent assault charges, and because the jury had found him innocent of indecent assault, the court should interpret the jury verdict as finding that the underlying acts were not committed. *See id.* at 808. The trial court found the conduct constituting the Corruption of Minors to be indecent assault and, since the government failed to prove "the specific acts" (indecent assault), the Commonwealth failed to sustain its burden of proof for the corruption charge. *See id.* The Superior Court, however, reversed the trial court's order and reinstated the jury verdict, concluding that sufficient underlying specific acts by Anderson, other than indecent assault, substantiated the Corruption of Minors charge. *See id.* at 881.

In the case at bar, the trial court interpreted the act of enticing alleged in the Information, *viz.*, "enticing the complainant to engage in sexual intercourse," to include all evidence of "enticement" presented during the course of

the trial. *See N.T.* 3/28/01, 66-69. Accordingly, the trial court instructed the jury as follows:

> The next offense charged is Corruption of Minors. In order to find the defendant guilty of the crime of corrupting a minor, you must be satisfied the following three elements have been proved beyond a reasonable doubt. I've talked earlier to you about knowingly or recklessly. Here the allegation is intentional; that is, it was a conscious object or purpose to achieve a particular result. That's the nature of the charge here.
>
> In order to find the defendant guilty of the crime of corrupting a minor, you would have to be satisfied the following elements have been proven beyond a reasonable doubt. First, that the defendant corrupted or tended to corrupt the morals of [CW]. Second, that the defendant was at the time 18 years old or older. And, third, that [CW] at the time was a minor less than 18 years old. Those are the requirements.

N.T. 3/28/01, 153-4. The foregoing charge conforms to the Pennsylvania criminal law. *See* 18 Pa. C.S. § 6301.[8]

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[8] 18 Pa. C.S. § 6301 (Corruption of Minors):

(a) OFFENSE DEFINED

(1) Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.

(Continued on following page)

Clearly, this accurate instruction did not "so infect the entire trial that the resulting conviction violated due process." *Cupp*, 414 U.S. at 147. The trial court, having properly instructed the jury, yielded a conviction that is neither contrary to, nor an unreasonable application of, federal law.

Petitioner further argues that the jury instruction "created a strict liability offense" and that his counsel was ineffective for "recogniz[ing] the problem of a strict liability statute/prosecution," but failing to object thereto. *See* Pet. at 51-52. These claims, unexhausted and procedurally defaulted, lack merit. *See* Section III, *infra*.

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(2) Any person who knowingly aids, abets, entices or encourages a minor younger than 18 years of age to commit truancy commits a summary offense. Any person who violates this paragraph within one year of the date of a first conviction under this section commits a misdemeanor of the third degree. . . .

(c) PRESUMPTIONS.

In trials and hearings upon charges of violating the provisions of this section, knowledge of the minor's age and of the court's orders and decrees concerning such minor shall be, presumed in the absence of proof to the contrary.

(d) MISTAKE AS TO AGE.

(1) Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is under 16 years, it is no defense that the actor did not know the age of the minor or reasonably believed the minor to be older than 18 years.

(2) Whenever in this section the criminality of conduct depends upon the corruption of a minor whose actual age is 16 years or more but less than 18 years, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the minor to be 18 years or older.

(6) Ineffective Assistance of Counsel Claims (Petitioner's Ground E)

(a) Failure to present exculpatory character evidence

Petitioner alleges trial counsel ineffectiveness for failure to (1) produce available good character witnesses to testify on his behalf and (2) rebut evidence of an e-mail Petitioner sent to the victim depicting a sexual fantasy. *See id.* Petitioner complains that his attorney "let his client be depicted as a man of bad character, when available reputation witnesses and an explanation of the genesis of the e-mail would have proved him otherwise." *Id.* at 56. Petitioner, in support of his arguments, attaches the affidavits of three individuals attesting their availability to testify at the time of trial. *See* Pet. at Exhibit E.

Addressing Petitioner's contentions on the character witness issue, the Superior Court reasoned as follows:

> To establish an [ineffective assistance of counsel] claim based on the failure to call a witness or witnesses, a defendant must establish that: 1) the witness existed; 2) the witness was available to testify; 3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; 4) the witness was prepared to cooperate and testify for defendant at trial; and 5) the absence of the testimony prejudiced defendant so as to deny him a fair trial. *See Commonwealth v. Ervin,* 766 A.2d 859, 865-66 (Pa. Super. 2000).
>
> Upon review of [Petitioner's] brief and affidavit in support of his claim as to the availability of character witnesses, we conclude that [Petitioner's] offer of proof is insufficient to demonstrate

[inneffective [sic] assistance of counsel]. In support of his claim, [Petitioner] has attached a copy of an affidavit attesting that 1) trial counsel interview "Mr. and Mrs. Hutton and Mr. Kutzler" . . . and 2) the character witnesses were available to testify. Despite [Petitioner's] insistence as to the availability of these character witnesses, there is no statement from these individuals indicating their availability or willingness to testify or that the substance of their testimony would have been beneficial to [Petitioner's] case. *See Ervin*, 766 A.2d at 865-66.

We also note that it is [Petitioner's] burden to overcome the presumption that trial counsel was effective. *See Commonwealth v. Williams*, 570 A.2d [75], 81 [(Pa. 1990)]. Accepting [Petitioner's] assertion that counsel interviewed the character witnesses, he fails to demonstrate that counsel had no reasonable basis for his decision not to call those witnesses. In fact, the trial court opines that because [Petitioner] had a prior criminal record, the presentation of character witnesses would permit the Commonwealth to introduce that record in order to impeach the witnesses' credibility. Trial Court Opinion, 10/10/01, at 16. [Petitioner] attempts to rebut the court's suggestion by relying on this Court's disposition in *Commonwealth v. Hammond*, 454 A.2d 60 (Pa. Super. 1982). We reasoned, in *Hammond*, that because the defendant's prior criminal record substantially predated the character witnesses's [sic] relationship with the defendant, the witness could not be examined as to his knowledge of those crimes. *See id.* at 65. Here, however, [Petitioner] has failed to demonstrate that his prior convictions substantially predate his acquaintance with his character

> witnesses. Therefore, we conclude that [Petitioner] has failed to meet his burden of proof that counsel rendered [ineffective assistance of counsel].

Commonwealth v. Alexander, No. 2194 at 10-12.

Evidence of good character can create a reasonable doubt as to guilt, and where intent and credibility are decisive factors in a case, the accused's reputation is of paramount importance. *See United States v. Logan,* 717 F.2d 84, 88 (3rd Cir.1983); *Commonwealth v. Luther,* 317 Pa. Super. 41, 463 A.2d 1073, 1078 (Pa. Super.1983) (stating that "evidence of good character may, in spite of all evidence to the contrary, raise a reasonable doubt in the minds of a jury"). *Luther,* 463 A.2d at 1078. Unlike Pennsylvania courts, the federal courts have not, beyond *Strickland* principles, articulated a standard for evaluating propriety of an attorney's failure to call certain witnesses. *See, e.g., Clark v. Klem,* No. 02-2850, 2004 U.S. Dist. Lexis 4621 (E.D. Pa. Mar.10, 2004) (Yohn, Jr., J.). *See also Philson v. Barbo,* 77 Fed. Appx. 123, 127, 2003 U.S. App. LEXIS 20778 (3rd Cir. Oct. 9, 2003) (under the "unreasonable determination of the facts" prong of 28 U.S.C. § 2254, the Third Circuit found that counsel's decision not to call two witnesses because of a potential conflict in testimony was "trial strategy," afforded it "appropriate deference," and did not find ineffective assistance of counsel under *Strickland*). However, the Third Circuit has held that "under *Strickland,* counsel's failure to assert a particular defense cannot be characterized as a 'strategy' unless counsel has investigated and consciously rejected" that defense. *See United States v. Kauffman,* 109 F.3d 186, 190 (3rd Cir. 1997).

Affidavits provided by Petitioner (Exhibit "E") show that trial counsel did interview various character witnesses, although he ultimately decided not to call them at trial. The state court's decision, thus, correctly applied the rules elucidated in *Commonwealth v. Ervin*, 766 A.2d 859, and *Strickland*. Petitioner has not identified any prejudice caused by the absence of the these witnesses and the trial court reasonably concluded that trial counsel strategically decided not to call them to avoid potentially damaging cross-examination regarding Plaintiffs criminal record. Avoidance of negative impeachment suffices as a reasoned trial strategy under *Strickland*. Thus, this court finds that counsel was not ineffective.

(b) "Fantasy" e-mail claim

Petitioner avers that trial counsel ineffectively "failed to prove, with evidence known to him and available at trial, that (1) his 'fantasy' had been written a year before [[P]etitioner encountered [the victim]; and (2) it was written for and about a 32 year old woman." Pet. at 53. This allegation is equally devoid of merit.

Petitioner does not deny writing his "fantasy" or forwarding it to the victim. He merely argues that its original recipient was an adult female. This court agrees with the Superior Court's tersely stated and legally sound determination regarding the "fantasy e-mail" issue: "[w]hether [Petitioner] wrote it for someone else or that he wrote it before his first communication with the victim is immaterial to the case." *Commonwealth v. Alexander*, No. 2194 at 10. The detriment in this case arose from sending the sexually explicit writing to a minor. Hence, the state court appropriately found details regarding the letter

origin to be irrelevant. Counsel cannot be held ineffective for failing to litigate raise a meritless claim, so this claim, too, fails. *See Strickland*, 466 U.S. at 686.

C. PROCEDURALLY DEFAULTED CLAIMS: DENIAL OF RIGHT TO PRESENT A DEFENSE (PETITIONER'S GROUND B); UNCONSTITUTIONAL CONVICTION BASED ON "STRICT LIABILITY" OFFENSE (PETITIONER'S GROUND (IV)

Petitioner argues that he was denied "the right to advance his/her defense." Pet. at 28. He also avers, without elaboration, that "[t]he jury instruction that permitted a conviction for conduct occurring when [P]etitioner and the complainant were communicating by e-mail and telephone, at a time when it was impossible for [him] to know or even suspect that the complainant was under the age of 18, created a strict liability offense." *Id.* at 51. These arguments were never properly raised in state court and are now barred from state court review, because Petitioner's year to file a PCRA action has expired. *See* 42 Pa.C.S. § 9545(b)(1).[9] Moreover, Petitioner cannot satisfy any of three narrow exceptions to the one-year PCRA time

[9] Since Petitioner's conviction became final after the effective date of the PCRA amendment, he had until October 28, 2003 to raise these claims. *See* 42 Pa.C.S. § 9545(b)(1). This statute of limitations, consistently applied since its effective date, thus, creates a jurisdictional bar to Petitioner's successful institution of PCRA proceedings in state court. *See Commonwealth v. Peterkin*, 422 A.2d 638 (Pa.1998); *Commonwealth v. Banks*, 726 A.2d 374, 375-76 (Pa. 1999). *See also Keller v. Larkins*, 251 F.3d 408, 415 (3rd Cir. 2001)

limit. *See* 42 Pa.C.S. § 9545(b)(1).[10] He neither claims recent discovery of relevant facts, nor suggests that a recent modification of state or federal supreme court law applies retroactively to afford him new rights. Furthermore, he has not alleged that any government officials interfered with his presentation of this claim. Thus, his state claims cannot be salvaged and, consequently, are procedurally defaulted.

Although federal courts, in appropriate circumstances, excuse procedural defaults, *see Caswell,* 953 F.2d at 863, Petitioner has neither alleged nor demonstrated facts sufficient to excuse his omission. Specifically, he has not adduced any evidence that objective factors, external to the defense, prevented timely presentation of these claims upon direct or collateral review. *See id.* at 862. Inasmuch as Petitioner cannot establish cause for his default, inquiry into prejudice suffered is unnecessary. He cannot

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[10] 42 Pa.C.S. § 9545(b) provides:

(b) Time for filing petition.

(1) Any petition under this subchapter ... shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

demonstrate actual innocence either, so no "fundamental miscarriage of justice" warrants habeas review or relief. *See Schlup*, 513 U.S. at 298. Petitioner's defaulted claims, therefore, should be dismissed.

III. CONCLUSION

This court finds that none of Petitioner's alleged errors emanate from a decision that is contrary to or an unreasonable application of federal law. Additional claims are unreviewable, because they were never presented to the state courts. Hence, habeas relief is inappropriate. I accordingly make the following:

RECOMMENDATION

AND NOW, this 30th day of August, 2004, for the reasons contained in the preceding report, it is hereby RECOMMENDED that the Petition for Writ of Habeas Corpus pursuant to U.S.C. § 2254 be DENIED without an evidentiary hearing. Petitioner has not demonstrated a substantial violation of any Constitutional right. Each of his claims is meritless or procedurally defaulted; therefore, there is no probable cause to issue a certificate of appealability.

CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**NO. 6019/00**
v.	:	
RAYMOND ALEXANDER	:	

OPINION

On March 28, 2001, following a trial by jury, Defendant/Appellant, Raymond Alexander was convicted of Statutory Sexual Assault[1], Involuntary Deviate Sexual Intercourse[2] and Corruption of Minors[3]. The evidence at trial revealed, without contradiction, the following:

In the evening hours of May 6, 2000 Corporal Daniel T. Getter and Corporal David Duffy of the Doylestown Township Police Department proceeded to Appellant's home in Doylestown Township, Bucks County to investigate a report of a missing fifteen-year-old female from Kentucky. Upon arrival at the residence, Corporal Getter knocked on the front door and was met by Appellant. As Appellant opened the front door, Cfficer Getter observed Appellant pulling up his pants. According to Corporal Getter, Appellant was not wearing underwear. Corporal Getter asked Appellant if the missing female was in the house to which Appellant replied that she was. Corporal Duffy then indicated to Appellant that he was under arrest

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[1] 18 Pa. C.S. § 3122.1.

[2] 18 Pa C.S. § 3123.

[3] 18 Pa. C.S. § 6301.

for Interference with the Custody of a Minor. At that point, Appellant stated, "She's 18". I have proof that she's 18."

The officers proceeded inside Appellant's residence to take protective custody of the minor, "C.W." After searching the house C.W. was located in bed in the master bedroom naked. Officer Getter testified at trial that C.W.'s clothes were strewn on the bed and the floor of the bedroom along with Appellant's clothing and underwear. An opened condom package was observed on the floor area of the foot of the bed. After locating C.W., the officers permitted her to get dressed and transported her to Doylestown Hospital and then to police headquarters.

At police headquarters C.W. explained that she met Appellant, a 52-year-old man, on the Internet personal pages in March of 2000. According to C.W. conversation between the two ensued via computer and telephone. During these conversations, Appellant made explicit remarks and expressed his desire to engage in sexual acts with C.W. After several weeks of contact, Appellant arranged to meet C.W. personally in Kentucky on May 5, 2000. On May 4, 2000 Appellant drove to Kentucky and checked into a hotel in South Louisville. On Friday, May 5, 2000 C.W. met Appellant for the first time in person at the entrance of her neighborhood. The two drove in Appellant's car to a parking lot where intimate physical contact occurred. Appellant then returned C.W. to her neighborhood.

On May 5, 2000, following an argument with her parents, C.W. telephoned Appellant at his hotel in Kentucky and requested that he pick her up at a clubhouse near her residence. At approximately 4 a.m. on May 5, 2000 Appellant drove to the clubhouse and met C.W.

Immediately, the two proceeded in Appellant's vehicle to his residence in Doylestown, Pennsylvania.

At approximately 6:00 a.m. on May 6, 2000, Appellant and C.W. arrived at Appellant's residence in Doylestown. Shortly after arriving at the house. Appellant expressed his desire to engage in sexual intercourse with C.W. Appellant and C.W. proceeded to the bedroom where Appellant performed oral sex on C.W. The two later engaged in anal sex.

C.W. testified at trial at length regarding the events preceding Appellant's arrest. Her testimony regarding the events was corroborated by evidence found as a result of a search of Appellant's premises. Throughout trial, C.W. admitted to consenting to the sexual acts. Appellant did not testify at trial, but offered the defense of mistake of age.

Following the verdict, on August 1, 2001, this Court sentenced Appellant to a period of incarceration of eight to sixteen years on the charge of Involuntary Deviate Sexual Intercourse and 20 years state probation on the remaining charges[4]. Thereafter on August 13, 2001, Appellant filed a Motion for Reconsideration of Sentence. By Order dated August 13, 2001 we denied Appellant's Motion but corrected his sentence as to the involuntary deviate sexual intercourse charge. This appeal followed.

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[4] Appellant's conviction on the charge of Involuntary Deviate Sexual Intercourse subjected Appellant to the requirements of Pennsylvania's Megan's Law, 42 Pa C.S. § 9795.1. Following conviction, Appellant filed a Motion for Extraordinary Relief seeking to challenge the constitutionality of the provisions of Megan's Law II Appellant later withdrew this Motion through his counsel in open court on July 25, 2001. This Court then proceeded to sentencing.

ISSUES:

Appellant's Rule 1925(b) statement sets forth the following allegations of error:

1. The trial court erred in precluding defendant from introducing evidence that in her internet ad the complainant described herself as "slightly experienced", or by conditioning admission of such evidence on telling the jury a fabrication, to wit, that said statement was a falsehood, as the statement itself was material to the defense of mistake of age its probative value outweighed any prejudice and the designation of it as a falsehood would impermissibly diminish the significance of the evidence by suggesting to the jury that the defendant also knew it to be false and by falsely and impermissibly asserting the chastity of the complainant. The truth or falsity of the statement was not at issue; rather, the fact that it,was uttered and presented as true by the complainant was the significant fact;

2. To the extent that trial counsel did not proffer the relevance of the information set forth in paragraph 1, appellant was deprived of effective assistance of counsel. To the extent that trial counsel did not follow the procedures of the Pennsylvania Rape Shield Law for the admission of this evidence, trial counsel was ineffective;

3. The trial court erred in excluding evidence of the number of responses the complainant received in her internet advertisement, and the fact that she chose appellant from among numerous respondents because he

was the only one who would accept her collect calls, as this was evidence of her plan/intent to have a relationship with an older man and thus evidence to rebut a claim that she was exploited knowingly by appellant;

4. To the extent that trial counsel did not proffer the relevance of the information set forth in paragraph 3, appellant was deprived of effective assistance of counsel. To the extent that trial counsel did not follow the procedures of the Pennsylvania Rape Shield Law for the admission of evidence, trial counsel was ineffective;

5. The trial court erred in excluding evidence that the complainant had entered into a relationship with another adult male, as such evidence was admissible proof of plan and intent of the "complainant pursuant to Pa. R.E. 404, to show that the complainant actively deceived defendant and to rebut a claim that she was knowingly exploited by appellant. The evidence was also admissible, as it was relevant in cross-examination of the complainant to show what she has told Mr. Alexander, and thus probative of his state of mind and relevant to the defense of mistake of age. The exclusion of this evidence deprived appellant of his constitutional right to present a defense;

6. To the extent that trial counsel did not proffer the relevance of the information set forth in paragraph 5, appellant was deprived of the effective assistance of counsel. To the extent that trial counsel did not follow the procedures of the Pennsylvania Rape Shield

Law for the admission of this evidence, trial counsel was ineffective;

7. The prosecutor erred by asking the complainant's mother questions regarding whether, as was asked by defense counsel at the preliminary hearing, her daughter was the victim of abuse, as such questioning impermissibly suggested that defendant had made such an allegation or that the defendant was now changing his story;

8. To the extent that trial counsel did not object to the questions detailed in paragraph 7, appellant was deprived of effective assistance of counsel;

9. Appellant was deprived of a fair trial and due process of law when the prosecutor elicited testimony from the father of the complainant that, at the hotel in Kentucky, appellant had provided a false home telephone number [a number with the wrong area code], an error compounded when the prosecutor argued the same as evidence of guilt, as the prosecutor knew from police reports within his control;

10. To the extent that trial counsel did not object to the prosecutor's questions or closing argument referenced in paragraph 9, appellant was deprived of the effective assistance of counsel;

11. To the extent that trial counsel did not use the police report to correct the false testimony of the complainant's father, appellant was deprived of the effective assistance of counsel;

12. To the extent that trial counsel did not object to the father's testimony regarding the contents of the hotel registration card on the grounds of the "best evidence" rule, appellant was deprived of the effective assistance of counsel;

13. Appellant was deprived of a fair trial, and convicted upon impermissible propensity evidence, when the Commonwealth adduced evidence of sexual conduct over the telephone, over the internet, and on the car ride from Kentucky to Pennsylvania, as such alleged acts were outside the jurisdiction of this Court, were not within the terms/scope of the count charging Corrupting Morals of a Minor, and constituted impermissible propensity evidence;

14. To the extent that trial counsel did not object to the evidence referenced in Paragraph 13, appellant was deprived of effective assistance of counsel;

15. Trial counsel was ineffective for failing to present evidence to show that the "porn fantasy" e-mail sent to the complainant was not written for her in particular but was written for another person one year prior to the encounter with the complainant, as this evidence would rebut the prosecution claim that petitioner knew or should have known the complainant to be underage. The evidence was available on the computer itself, as the computer recorded the date the "fantasy" was written; and by witness testimony of persons known to trial counsel;

16. Trial counsel was ineffective for failing to introduce all hospital records to show that the results of all sexual assault examinations, in particular the rape kit, were negative, and that no foreign matter – hair, semen, prostatic acid phosphatase, etc. – was present, as this was relevant to the defense presented, to wit, that no sexual intercourse of any kind occurred;

17. Trial counsel was ineffective in failing to present evidence of appellant's good character. Said evidence was available to trial counsel; its existence will be confirmed by affidavit of proof on direct appeal;

18. Appellant was deprived of a fair trial when the prosecutor argued at his closing that (a) "they would like you [the jury] to victimize her again," as this equated an acquittal with the jurors of being child abusers; (b) that appellant used a false area code at the Kentucky hotel, as this continued the knowing use of false testimony, and (c) that appellant knew of the complainant's age because of her paystub, when there was no evidence that appellant ever saw the complainant's paystub;

19. To the extent that trial counsel did not object to the closing arguments detailed in paragraph 18, appellant was deprived of effective assistance of counsel;

20. The trial court committed two inter-related errors in its charge to the jury on the offense of Corrupting the Morals of a Minor. It permitted the jury to convict appellant for any act he perpetrated on his telephone or on the

internet from his home in Pennsylvania when the recipient was not in Pennsylvania, which is extra jurisdictional; and the court impermissibly failed to limit the charge on corrupting the morals of a minor to the act averred in the charging document, to wit, enticing the complainant to have intercourse, depriving appellant of due process and reasonable notice of the charge he was to defend against;

21. To the extent that trial counsel did not object to the jury charge issues detained in paragraph 20, appellant was deprived of the effective assistance of counsel;

22. The trial court jury instruction in Corrupting the Morals of a Minor was deficient in a third aspect, one resulting in Constitutional error. The instruction permitted a conviction for conduct that occurred before defendant Alexander ever saw/met the complainant, and thus had no basis for even suspecting she might be a minor. To that extent, a conviction deprived petitioner of Due Process of Law, as there is no mens rea requirement and as the statute is therefore impermissibly broad.

23. The court's sentence was illegal for the below reasons:

    a. All crimes merged for sentencing purposes. The court defined both the IDSI and Statutory Sexual Assault as including penetration per os or per anus, as there was only a general verdict, with no specific jury determination of how many acts of penetration occurred, the

ambiguity of the jury verdict does not reveal whether the jury found appellant to have committed one or more than one act of penetration. In such a circumstance; it is impermissible and a violation of Due Process to impose multiple sentences for what may have been a conviction for a single act.

b. The crime of CMOM also merged, as the general charge that any corrupting act would be sufficient to convict appellant does not reveal which act the jury relied upon. Again, the ambiguity of this verdict, which is consistent with the jury finding that but one act occurred for all three offenses, constitutionally precludes multiple sentences.

c. The probationary sentence imposed on the statutory sexual assault count exceeded the statutory maximum for that offense and was hence, illegal.

d. The imposition of any condition pursuant to "Megan's Law" was unconstitutional as the criminal acts alleged against appellant, and his arrest predated the enactment/effective date of Megan's Law.

24. To the extent that trial counsel did not object to the illegal sentences detailed in paragraph 23, appellant was deprived of the effective assistance of counsel.

DISCUSSION:

Rape Shield Issues

Appellant first contends that this Court committed reversible error in precluding the introduction of evidence that was material to the defense of mistake of age. Specifically, Appellant contends that we erroneously precluded evidence showing that in the complainant's internet ad she described herself as "slightly experienced"; that the complainant had received a number of responses to her internet advertisement; that she chose Appellant because he would accept her collect calls; and that the complainant had entered into a relationship with another adult male before meeting Appellant.

The admissibility of evidence is a matter solely within the discretion of the trial court. A trial court will be reversed on an evidentiary ruling only where a clear abuse of discretion occurs. *Commonwealth v. Foy*, 531 Pa. 322, 612 A.2d 1349 (1992). The law regarding evidence of the introduction of a complainant's sexual history is set forth in Pennsylvania's Rape Shield statute, which provides:

> (a) General rule. – Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa. C.S. § 3104. The purpose of the Rape Shield Law is to prevent a sexual assault trial from degenerating into an

attack upon the victim's reputation and chastity. *Commonwealth v. Weber*, 549 Pa. 430, 701 A.2d 531 (1997). "By excluding from trial evidence of the victim's past sexual conduct, the possibility of confusion and prejudice is thus minimalized." *Commonwealth v. Wall*, 413 Pa.Super. 599, 606 A.2d 449, 455 (1992). "[T]he Rape Shield Law aids in the fact finder's search for the truth by excluding evidence which might distract from legitimate issues involved in sexual assault cases." *Id.* In other words, the purpose of the statute is to prevent trial of the victim instead of the accused. *Id.*

Although the only specific exception contained in the statute is the admission of prior consensual activity with the accused, other exceptions have been carved out by our appellate courts to accommodate an accused's right under the Confrontation Clause of the Sixth Amendment to the United States Constitution to confront and cross-examine witnesses against him/her. *Commonwealth v. Guy*, 454 Pa. Super. 582, 686 A.2d 397 (1996). Generally, evidence tending to directly exculpate the accused by showing that the alleged victim is biased and has a motive to lie, fabricate, or seek retribution is admissible at trial. *Id.* When determining whether evidence of a complainant's sexual history may be introduced, a trial court must consider: (1) if the evidence sought to be admitted is relevant to the accused's defense, (2) whether the evidence sought to, be admitted is merely cumulative of evidence otherwise admissible at trial, and (3) whether the evidence which the accused wishes to introduce at trial is more probative than prejudicial. *Commonwealth v. Fernsler*, 715 A.2d 435, 439-440 (Pa. Super. 1998).

In this case, prior to trial Appellant filed a Motion in Limine in which he sought to introduce evidence regarding

a prior relationship the complainant had in February of 1999 with an older man. Further, Appellant sought to introduce evidence that C.W.'s previous relationship was exposed by her father. Appellant asserts that this evidence was relevant to show that C.W. was motivated to press the charges against Appellant to deflect blame from herself. Appellant also contends that this evidence was material to the defense of mistake of age as it demonstrates C.W.'s past history of soliciting and deceiving older men.

Here, it is apparent from the testimony adduced at trial that the introduction of this evidence would only distract from the legitimate issues involved in the case and seek to harass the complainant. The record clearly demonstrates that C.W. was not pursuing the charges merely to seek retribution against Appellant and to deflect blame from herself C.W. testified candidly that she willingly participated in the sexual acts with Appellant and that she misrepresented her age in order to do so. (N.T. 3/27/01 p. 79, 86, 107-109). C.W. also admitted that prior to meeting Appellant she was seeking to have a relationship with an older man. (N.T. 3/27/01 p. 166). Thus, evidence concerning C.W.'s past sexual conduct or sexual preference was irrelevant to the central issue before the jury, i.e., whether Appellant reasonably believed C.W. to be 18, and more prejudicial than probative. Most significantly, Appellant was not prohibited from cross-examining the complainant regarding her desire to have a relationship with an older man or the fact that she lied to Appellant about her age.

Likewise, under the facts of the instant case, any statements that C.W. made concerning her level of sexual experience on the internet were properly precluded as irrelevant and prejudicial since they were closely tied to

the issue of C.W.'s chastity and sexual preference. Significantly, the record reflects that this Court's offer to show, by stipulation, that C.W.'s statements concerning her level of experience were false was declined by counsel. Counsel's decision to decline the stipulation demonstrates that it was defense counsel's motivation not to show C.W.'s deception, but to pierce the rape shield statute.

Finally, Appellant argues that this Court erred in precluding evidence of the number of responses the complainant received to her internet advertisement and that she had chosen Appellant from among the numerous responses because he was the only one who would accept her collect calls.

C.W. testified extensively concerning the placement of her internet advertisement. She admitted during both direct and cross-examination that she requested that she call Appellant collect and that the two had made calling arrangements. (N.T. 3/27/01 p. 85, 166, 176). C.W. further admitted that her purpose in placing the internet advertisement was to meet an older man. (N.T. 3/27/01 p. 166). With regard to the responses to C.W.'s internet ad, none of the respondents was called to testify at trial. Any testimony concerning their out-of-court statements would have been hearsay which is not within any hearsay exception.

Prosecutorial Misconduct

Next, Appellant contends that prosecutorial misconduct occurred when the prosecutor posed certain questions to the Commonwealth's witnesses that made impermissible suggestions to the jury.

First, Appellant argues that the prosecutor improperly questioned the complainant's mother whether the complainant had been previously abused. According to Appellant the following questioning by the prosecutor suggested that the defendant had altered his defense theory:

> Q: . . . [T]here was questions placed to your daughter at the preliminary hearing as to whether she had been in a fight or argument or abused by her father prior to her leaving the house. At any time prior to her leaving did you see any signs of physical abuse by [your husband] upon C.W.?
>
> A: No.

(N.T. 3/27/01 p. 46). We disagree with Appellant that this questioning prejudiced or biased the jury. Evidence concerning prior abuse was relevant to the statutory justification defense as set forth in 18 Pa.C.S.A. § 2904(b)(1), an issue raised at the preliminary hearing, and the prosecutor did not commit misconduct by presenting it. See *Commonwealth v. Kemp*, 753 A.2d 1278, 1284 (Pa. 2000).

Appellant next contends that he was deprived of a fair trial when the prosecutor elicited testimony from the father of the complainant that, at the hotel in Kentucky, Appellant had provided a false home telephone number when the prosecutor knew from police reports that the phone number provided by Mr. Alexander was indeed complete and accurate.

The record reflects that during direct examination C.W.'s father testified concerning the events which occurred following his discovery that his daughter was missing. Specifically, C.W.'s father described how C.W. was linked to the defendant, who had been staying at a hotel

outside of Louisville through papers found in C.W.'s room and a registration card found at the hotel:

> Q: And were you able to go with Chief Jesse, were you able to go through the registrations at the front desk?
>
> A.: Yes. The people at the desk were extremely accommodating to us, to Chief Jesse, and we went through all the registrations of the individuals.
>
> Q: Did you find anybody named Ray or Raymond registered that (sic) the hotel?
>
> A: Yes, we did. There was a registration for a Raymond Alexander that we discovered. I believe there might have been another Raymond but this was a Raymond Alexander from Pennsylvania.
>
> Q: By the way, you just gave the name "Raymond Alexander". Did you know at that time anyone named Raymond Alexander?
>
> A: I did not.
>
> Q: Was Mr. Alexander still there? Was he still registered at the hotel?
>
> A: At that time it would have been about 12:00 to 1:00 p.m. in the afternoon. He was not.
>
> Q: Okay. The hotel showed you the information, however; is that correct?
>
> A: They did.
>
> Q: Did they also show you his phone number?
>
> A: As part of the registration card a phone number was on there. What I recognized was not the area code, the area code was different, but

> the last seven digits were very familiar from what we had in our home. I remember calling my wife and I asked her to repeat the last seven digits, and there was an identical match on the last seven digits.
>
> Q: Just so I'm clear, the last seven digits of the telephone number on the registration card at the hotel matched the last seven digits of this piece of paper that you and your wife had pieced together that was ripped up in Carrie's room; is that correct?
>
> A: That's correct.
>
> Q: The registration card at the hotel, did that have a 215 are code on it?
>
> A: No, it did not.

(N.T. 3/27/01 p. 65-67). There is nothing in the record or the aforementioned testimony which suggests that the prosecutor knowingly elicited false testimony from the father of the complainant that Appellant had provided an incorrect telephone number to the hotel in Kentucky. In fact, there is nothing in the record that indicates that this witness' testimony was indeed false. In any event, any misstatement by the complainant's father on this point was immaterial and could not have reasonably affected the outcome of the trial.

Appellant also contends that he was deprived of a fair trial and convicted upon impermissible evidence when the Commonwealth adduced evidence of sexual conduct over the telephone and internet and on the car ride from Kentucky as those acts were outside the jurisdiction of the Court.

C.W.'s testimony consisted of an account of several sexually explicit conversations which she had with Appellant by telephone and internet. In addition, C.W. recounted the events occurring during the car ride to Pennsylvania. These events directly preceded the commission of the specific offenses at issue and therefore provided a significant background to the crimes charged and to Appellant's state of mind. The facts elicited from C.W. were so heavily related to the circumstances of the sexual acts at issue that their evidentiary value greatly outweighed any possible prejudice suffered by Appellant. Moreover, in our instructions to the jury, we made clear that all events occurring outside of Pennsylvania could not be taken into account in the determination of guilt or innocence. (N.T. 3/28/01 p. 140). Given this instruction, any error in admitting this evidence was harmless.

The fourth claim of prosecutorial misconduct raised by Appellant involves allegedly improper comments during the Commonwealth's closing. Specifically, Appellant contends that the prosecutor argued in his closing 1) "they would like you [the jury] to victimize her again; 2) that Appellant used a false area code at the Kentucky hotel despite evidence suggesting that he did not; and 3) that Appellant knew of the complainant's age because he saw her paystub when there was no evidence to suggest that Appellant saw the complainant's paystub.

A prosecutor's closing remarks must be limited to facts in evidence and legitimate inferences therefrom. *Commonwealth v. Colson*, 507 Pa. 440, 465, 490 A.2d 811, 824 (1985), *cert. denied*, 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986). The prosecutor may properly comment on the evidence and is permitted to do so with reasonable oratorical flair. *Commonwealth v. Banks*, 450 Pa.Super.

555, 562, 677 A.2d 335, 339 (1996), *appeal denied*, 548 Pa. 613, 693 A.2d 585 (1997). The prosecution must have a degree of latitude in advocating its position because "we must not lose sight of the fact that the trial is an adversary proceeding." *Id.* On review, comments by the prosecutor during closing arguments must be considered in the context of the entire summation. *Id.* A prosecutor's language during closing argument will not constitute reversible error "unless its unavoidable effect would be to prejudice the jury, forming in their minds, fixed bias and hostility toward the defendant, so that they could not weigh the evidence and render a true verdict." *Id.* at 561, 677 A.2d at 338.

Reviewing the Commonwealth's closing in the present case in its entirety, we cannot conclude that Appellant was prejudiced. The prosecutor's remarks were supported by the evidence, contained inferences which were reasonably drawn from the evidence and were not so prejudicial as to make it impossible for the jury to render a true and proper verdict.

Defense Counsel's Failure to Produce Evidence

Appellant raises several arguments alleging ineffective assistance of trial counsel. Appellant maintains that defense counsel failed to show that a porn fantasy e-mail sent to the complainant was not written for her, that defense counsel failed to introduce all hospital records showing the results of all sexual assault examinations; and that defense counsel failed to present evidence of Appellant's good character.

In order for Appellant to prevail on each claim of ineffective assistance of counsel, he must show: (1) the

underlying claim is of arguable merit; (2) the particular course of conduct of counsel did not have some reasonable basis designed to effectuate his interests; and (3) counsel's ineffectiveness prejudiced him. See *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). The burden of establishing counsel's ineffectiveness is on the appellant because counsel's stewardship of trial is presumptively effective. *Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985).

Appellant first claims that trial counsel was ineffective because counsel failed to show that a porn fantasy e-mail sent to the complainant was not written for her. The record herein establishes that in its case in chief, the Commonwealth introduced a sexually explicit e-mail sent by Appellant to C.W. in response to her internet ad. Although defense counsel did not offer any evidence to establish whether the e-mail was originally written for the complainant, this omission was harmless since the e-mail was eventually forwarded to and received by C.W. Moreover, based on the nature of the e-mail, the relative uselessness of the material contained therein and the potential prejudicial impact, there was likely a reasonable basis for defense counsel not to demonstrate that Appellant had sent the e-mail to other individuals.

Appellant's second contention, that defense counsel was ineffective for failing to introduce all of C.W. hospital records, fails under the first prong of the ineffectiveness test, as the underlying claim is without merit. The record discloses that the Commonwealth introduced C.W.'s hospital records into evidence. (See Exhibit D-1). In addition, defense counsel cross-examined C.W. concerning the contents of those records at which time she admitted

that the records indicated that there was no anal penetration. (N.T. 3/27/01 p. 145).

Appellant next claims that defense counsel was ineffective for failing to present evidence of Appellant's character. This argument also fails since it is evident from the record that trial counsel's decision not to present character witnesses was in the realm of trial strategy. Apparently defense counsel chose not to place Appellant's character at issue since Appellant had a prior criminal record.

Jury Instructions

Appellant next asserts that this court erred in is [sic] instruction on Corrupting the Morals of a Minor. Appellant argues that the instruction permitted a conviction for conduct that occurred before Appellant ever met the complainant and deprived him of due process of the law. In addition, Appellant contends that our jury instruction on the charge of Corrupting the Morals of a Minor was deficient in that it permitted the jury to convict Appellant for an act perpetrated on his telephone or internet when the recipient was not in Pennsylvania.

When reviewing a challenge to a part of a jury instruction, the Court must review the jury charge as a whole to determine if it is fair and complete. *Commonwealth v. Saunders*, 529 Pa. 140, 144, 602 A.2d 816, 818 (1992). A trial court has broad discretion in phrasing its charge and can choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there

reversible error. See *Commonwealth v. Prosdocimo*, 525 Pa. 147, 150, 578 A.2d 1273, 1274 (1990).

In the present case, the record reflects that we instructed the jury concerning the charge of Corrupting the Morals of a Minor as follows:

> The next offense charged is Corruption of Minors. In order to find the defendant guilty of the crime of corrupting a minor, you must be satisfied the following three elements have been proved beyond a reasonable doubt. I've talked earlier to you about knowingly or recklessly. Here the allegation is intentional; that is, it was a conscious object or purpose to achieve a particular result. That's the nature of the charge here.
>
> In order to find the defendant guilty of the crime of corrupting a minor, you would have to be satisfied the following elements have been proved beyond a reasonable doubt. First, that the defendant corrupted or tended to corrupt the morals of C.W. Second, that the defendant was at the time 18 years old or older. And, third, that C. W. at the time was a minor less than 18 years old. Those are the requirements.

(N.T. 3/28/01 p. 153-154). Before giving this charge we directed the jury that the only offenses charged and relevant were those that occurred in Bucks County:

> The offenses which are charged here are charged as having occurred, in Bucks County, Pennsylvania. The material that you heard form (sic) the background of those circumstances. And while they create the background, give you a texture and sense of the history of the matter alleged and all that evidence may be useful to you in

> making determinations about credibility or making determinations about what happened in the house in Bucks County, you cannot convict the defendant based upon those acts in other jurisdictions.

(N.T. 3/28/01 p. 140). Our instruction left no doubt as to the law to be applied by the jury. We expressly directed that the jury could not convict Appellant on any acts occurring in other jurisdictions. Thus the record does not support Appellant's claim that he was prejudiced by our jury instructions.

Legality of the Sentence

Lastly, Appellant asserts numerous claims concerning claims the legality of his sentence. First, Appellant claims that all crimes merged for sentencing purposes and that it was impermissible to define both the Involuntary Deviate Sexual Intercourse charge and the Statutory Sexual Assault charge as including penetration per os or per anus.

In *Commonwealth v. Anderson*, the Pennsylvania Supreme Court considered the issue of merger of sentences and noted that the question of when sentences should merge "concerns whether a single criminal plan, scheme, transaction or encounter, which may or may not include many criminal acts, may constitute more than one crime, and if it may constitute several crimes, whether each criminal conviction may be punished separately." *Anderson*, 583 Pa. 574, 650 A.2d 20 (1994). In *Anderson*, the defendant was convicted of aggravated assault, attempted murder and possession of an instrument of crime based on a single shooting that left the victim a quadriplegic. On appeal, the defendant argued that the sentences

for aggravated assault and attempted murder should merge and the Court agreed. *Id.* at 583, 650 A.2d at 24. The Supreme Court reasoned that "the same facts may support multiple convictions and separate sentences for each conviction except in cases where the offenses are greater and lesser included offenses." *Id.* at 579, 650 A.2d at 22.

In *Commonwealth v. Comer*, the Supreme Court clarified its earlier analysis in *Anderson* which permitted a determination of merged based on a comparison of the statutory elements alone. *Id.* 552 Pa. 527, 716 A.2d 593 (1998). In revising the *Anderson* standard, the *Comer* Court explained that when considering whether merger applies, the facts underlying each conviction must be considered as well as the statutory elements of the crime. *Id.* 552 Pa. 538, 716 A.2d 599.

Our initial inquiry is to consider the statutory elements of the crimes at issue. The crime of involuntary deviate sexual intercourse occurs when an individual engages in "deviate sexual intercourse" with another person:

> (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; (4) who is so mentally deranged or deficient that such person is incapable of consent; or (5) who is less than 16 years of age.

18 Pa. C.S. § 3123. "Deviate sexual intercourse includes "[s]exual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal." 18 Pa. C.S. § 3101. The term also includes penetration, however slight, of the genitals or anus of another

person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures. *Id.*

The crime of statutory sexual assault occurs when a "person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant." 18 Pa. C.S. § 3122.1. Sexual Intercourse is defined as "[i]n addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required." 18 Pa. C.S. § 3101.

Based on the above statutory definitions, this Court appropriately defined statutory sexual assault and involuntary deviate sexual intercourse as including penetration per os or per anus. Further, sufficient evidence exits to sustain Appellant's convictions for both statutory sexual assault and involuntary deviate sexual intercourse. The evidence adduced at trial revealed that Appellant engaged in both oral and anal intercourse with C.W. (N.T. 3/27/01 p. 124-125). Therefore, the two convictions rested on separate acts and merger was not required. See *Commonwealth v. Frank*, 433 Pa. Super. 246, 640 A.2d 904, 908 (1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994).

Appellant next contends that the charge of Corrupting the Morals of a Minor merged with the other charges for sentencing purposes.

The offense of corruption of a minor is defined as "[w]hoever, being the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age . . . commits a misdemeanor in the first degree." 18 Pa. C.S. § 6301(a)(1). The statute also provides that no adjudication of delinquency is required,

that the actor's knowledge of the minor's age shall be presumed, and that mistake of age is not a defense if the minor is under 16 years of age. 18 Pa. C.S. § 6301(c),(d).

For the offense of corruption of a minor, the statute does not specify the nature of the corruption, nor does it limit its protective scope to sexual matters. See *Commonwealth v. Smith*, 772 A.2d 75 (Pa. Super. 2001). In contrast, the applicable portions of statutory sexual assault statute and the involuntary deviate sexual intercourse statutes seek to prevent sexual intercourse between persons under the age of 16 and those four or more years older than the minor. 18 Pa. C.S. § 3122.1, 3123. As noted recently by the Pennsylvania Superior Court, based on the statutory elements alone, the offense of corruption of a minor is not necessarily a lesser included offense of statutory sexual assault. *Commonwealth v. Smith*, 772 A.2d 75 (Pa. Super. 2001). For the same reasons, we conclude that the involuntary deviate sexual intercourse and corruption of a minor statutes do not necessarily merge.

In addition, the record supports separate sentences for statutory sexual assault, corruption of a minor and involuntary deviate sexual intercourse. C.W. testified that upon arriving at his residence, Appellant asked C.W. whether she would engage in anal intercourse. (N.T. 3/27/01 p. 124). Shortly afterward, the two proceeded to Appellant's bedroom where Appellant performed oral sex on the complainant and later engaged in anal sexual intercourse. (N.T. 3/27/01 p. 124-125).

Appellant's third claim of error involves the probationary sentence imposed on the statutory sexual assault

charge. As reflected in the record, upon review of Appellant's Motion for Reconsideration of Sentence we corrected his sentence as to this count.

Appellant's final claim is that the imposition of the registration requirements on Appellant pursuant to Pennsylvania's Megan's Law is unconstitutional since the criminal acts alleged against appellant pre-dated the effective date of the statute. In *Commonwealth v. Bannigan*, No. 2000-5733 (C.P. Bucks Co., September 18, 2001), this Court reviewed a double jeopardy and ex post facto challenge to the registration requirements of Megan's Law II and determined that the registration requirements were constitutional.

CONCLUSION:

We believe the foregoing addresses all of the issues raised in this appeal.

BY THE COURT:

/s/ [Illegible]
EDWARD G. BIESTER, JR.,
S.J.

DATED: 10/10/01

COMMONWEALTH OF PENNSYLVANIA Appellee v. RAYMOND ALEXANDER, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2194 EDA 2001

Appeal from the Judgment of Sentence entered August 1, 2001, Court of Common Pleas, Bucks County, Criminal Division at Nos. 6019-00

BEFORE: JOHNSON, BROSKY and MONTEMURO*, JJ.

MEMORANDUM: **FILED APRIL 25, 2002**

Raymond Alexander appeals the judgment of sentence entered following his conviction of Involuntary Deviate Sexual Intercourse (IDSI), Statutory Sexual Assault and Corruption of a Minor. ***See*** 18 Pa.C.S. §§ 3123, 3122.1, 6301 (respectively). Alexander raises various allegations of trial court error, prosecutorial misconduct and ineffective assistance of counsel. After study, we conclude that Alexander has failed to demonstrate reversible error. Accordingly, we affirm the judgment of sentence.

In the spring of 2000, Alexander responded to a personal advertisement placed on the Yahoo.com website by Carrie Williams. At the time, Williams was 15 years old and living in Kentucky. Over the next couple of months, the pair developed a relationship wherein they would engage in telephone and Internet "sex" and role-playing.

* Retired Justice assigned to Superior Court.

Throughout their relationship, Williams represented that she was 18 but still living with her parents.

On May 5, 2000, Alexander drove to Kentucky to meet Williams in person. Alexander picked up Williams at the entrance of her development and drove to a nearby soccer field where the two fondled and kissed each other. Thereafter, Alexander drove Williams home before going back to his hotel. That evening, Williams got into an argument with her parents and ran away from home. Using her mother's cellular phone, Williams called Alexander at his hotel and arranged to have him pick her up. When Alexander arrived, Williams showed him a fake identification card in an attempt to prove she was 18. At Alexander's request, Williams accompanied Alexander back to Buck's County. Upon arriving at Alexander's house, the two engaged in anal and oral intercourse.

Williams's parents conducted a search of her belongings and discerned that she had been communicating with, Alexander and that he had been staying at a local hotel. Shortly thereafter, the Louisville Police Department contacted Corporal Getters of the Doylestown Police Department and apprised him of the situation. Corporal Getters, along with three other officers, proceeded to Alexander's residence. Corporal Getters knocked on the door and asked Alexander as to Williams's whereabouts. Alexander directed Corporal Getters to the bedroom where Williams was then hiding. Corporal Getters arrested Alexander for Interfering with the Custody of a Minor. In response Alexander stated, "She's 18. I have proof that she's 18." The police found Williams in Alexander's bedroom lying naked under the sheets and took her into protective custody.

The Commonwealth charged Alexander with the aforementioned crimes as well as two drug violations that were later severed for a separate trial. In this matter, Alexander attempted to defend against the charges by demonstrating he was mistaken as to Williams's age. A jury found Alexander guilty of IDSI, Statutory Sexual Assault and Corruption of a Minor. The trial court sentenced Alexander to a term of eight to sixteen years' incarceration for the IDSI conviction, to be followed by a total of fifteen years' probation for the latter convictions. Further, the court ordered that, upon his release, Alexander be required to register as a sexually violent predator under Megan's Law II. Alexander then obtained new counsel and filed this appeal.

Alexander raises the following for our consideration:

1. [Alexander] was deprived of the constitutional rights to confront witnesses and to present critical defense evidence by the rulings of the lower court and by trial counsel's ineffectiveness.

2. [Alexander] was deprived of a fair trial, and the effective assistance of counsel, when impermissible and false evidence was elicited from the complainant's parents, an error compounded by the failure to establish the falsity of the evidence and object to its use during closing argument.

3. [Alexander] was deprived of a fair trial, and the effective assistance of counsel, when trial counsel failed to adduce evidence of innocence [good character evidence] [sic] and evidence rebutting the prosecution case.

4. [Alexander] was deprived of a fair trial, and the effective assistance of counsel, when the trial court permitted evidence of acts outside the limitations of the Information charging Corrupting the Morals of Minors, an error compounded by the trial court's charge that the jury could consider acts beyond the scope of the charging document.

5. [Alexander] was deprived of a fair trial, and the effective assistance of counsel, by the numerous acts of prosecutorial misconduct made during closing arguments and counsel's failure to object thereto.

6. [Alexander] was deprived of due process of law, a fair trial and the effective assistance of counsel, when his jury was instructed that it could convict on the charge of Corrupting the Morals of a Minor for acts which occurred when it was impossible for [Alexander] to know, or even suspect, that the complainant was less than 18 years old.

7. [Alexander's] sentence was illegal, because of merger required by an ambiguous verdict, and the failure of trial counsel to object to the same deprived [Alexander] of the effective assistance of counsel.

Brief for Appellant at 5.

In support of his first question, Alexander alleges both trial court error **and** ineffective assistance of counsel with respect to the preclusion of several pieces of evidence. Brief for Appellant at 20, 28. Alexander argues that he should have been permitted to introduce at trial Williams's: 1) statements that she was "slightly experienced"; 2) comments regarding her prior sexual encounters with

other adult men; and 3) misrepresentations generally leading Alexander to believe she was 18. Brief for Appellant at 21. Alexander concludes that this evidence was essential to his defense that he was mistaken as to Williams's age. Alexander then attributes error to trial counsel for failing to proffer this evidence in a "detailed manner." Brief for Appellant at 20.

The trial court, in its 1925(a) opinion, provides a well-reasoned analysis with respect to Alexander's claim of trial court error in his first question. Trial Court Opinion, 10/10/01, at 7-10. To the extent it addresses Alexander's claim of trial court error, we adopt the trial court's reasoning and conclude that his contention is without merit. Also, we observe that the trial court has provided an excellent analysis with respect to Alexander's fourth and sixth questions regarding the court's jury charge. Trial Court Opinion, 10/10/01, at 16-18. Therefore, we will also adopt the trial court's reasoning with respect to Alexander's fourth and sixth questions. Accordingly, we conclude that Alexander has failed to demonstrate reversible error.

We turn to discuss Alexander's allegation that trial counsel rendered ineffective assistance for failing to 1) "proffer [statements that Williams was "slightly experienced," comments regarding her prior sexual encounters with other adult men and misrepresentations generally leading Alexander to believe Williams was 18.] in the detailed manner set forth [in Alexander's brief]" and 2) "proceed under the exceptions to Pennsylvania's Rape Shield Statute." Brief for Appellant at 20.

In reviewing an IAC claim, we presume that counsel was effective and place the burden on the appellant to prove otherwise. ***See Commonwealth v. Williams***, 570

A.2d 75, 81 (Pa. 1990). Appellant must meet the three-pronged test to prove IAC: "(1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." ***Commonwealth v. Wallace***, 724 A.2d 916, 921 (Pa. 1999). "Prejudice" in this context means, "but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different." ***Commonwealth v. Kimball***, 724 A.2d 326, 333 (Pa. 1999). Specifically, an appellant must prove that a reasonable probability of acquittal existed but for the allegedly ineffective conduct by trial counsel. ***See Commonwealth v. Tainan***, 734 A.2d 886, 889 (Pa. Super. 1999). If the appellant "has not met the prejudice prong of the ineffectiveness standard, the claim may be dismissed on that basis alone and the court need not first determine whether the first and second prongs have been met." ***Commonwealth v. Travaglia***, 661 A.2d 352, 357 (Pa. 1995).

As we have concluded that the substance of Alexander's argument is without merit, counsel would have no reason to raise before the trial court those arguments presently urged by Alexander. Therefore, we conclude that trial court did not render IAC. ***See Commonwealth v. Carpenter***, 725 A.2d 154, 161 (Pa. 1999) (stating that counsel cannot be considered ineffective for failing to raise a claim without merit).

Although Alexander poses his second question as an issue of ineffective assistance, we construe Alexander's issue as alleging primarily prosecutorial misconduct. Brief for Appellant at 29. Alexander then posits that because trial counsel failed to object to the prosecutor's conduct, he

rendered IAC. Brief for Appellant at 32. Specifically, Williams's father (Father) testified that when he went to Alexander's hotel in Kentucky, the area code provided on the registration card was false. N.T. Trial, 3/27/01, at 67. This was based on the fact that the area code did not match the one Father found among Williams's belongings. Alexander directs us to a police report Corporal Getters prepared after Alexander's arrest indicating that Alexander had in fact provided the correct area code. Brief for Appellant at 30 (citing Doylestown Police Report, 5/6/00, at 1). Alexander insists that not only did the prosecution present false testimony but also erroneously referenced such testimony in his closing remarks. Brief for Appellant at 30.

Initially, we observe that the offending testimony was merely a recollection of events leading to Alexander's identification and apprehension. Whether the proffered testimony was false is a question left in the hands of the jury. ***See Commonwealth v. Yaninas***, 722 A.2d 187, 189 (Pa. Super. 1999) (stating "[t]he jury, as the finder of fact, is free to believe all, some, or none of the testimony presented to it"). Accordingly, we are precluded from accepting Alexander's premise that such testimony was false.

With respect to the prosecutor's reference to the "false area code" in his closing remarks, it is well established that a prosecutor, just as a defense attorney, must have reasonable latitude in presenting a case to the jury and must be free to present his or her argument with logical force and vigor. ***See Commonwealth v. Chmiel***, 777 A.2d 459, 466 (Pa. Super. 2001). The prosecutor's closing remarks to the jury may contain fair deductions and legitimate inferences from the evidence presented during the

testimony. ***See id.*** Comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. ***See id.***

> Here, the prosecutor stated the following:
>
> He wanted her so bad that he put a fake or false area code on the registration at the hotel so hopefully he couldn't be traced. Do you want to talk about deception?

N.T. Trial, 3/28/01, at 122 (respectively). In light of the testimony offered by Williams's father, we conclude that the prosecution's reference to the "fake area code" merely raised a legitimate inference of deception based upon properly admitted evidence and thus the prosecutor did not engage in misconduct. Therefore, we conclude that Alexander failed to demonstrate reversible error. ***See Chmiel***, 777 A.2d at 466. Further, because the prosecution was permitted to refer to properly admitted evidence in his closing remarks, defense counsel had a reasonable basis not to object. Therefore, we conclude that counsel did not render IAC.

In support of his third question, Alexander contends that trial counsel was ineffective because he failed to rebut evidence of a "fantasy e-mail" that Alexander sent to Williams and did not call character witnesses to testify on his behalf. Brief for Appellant at 33, 36. Alexander argues that counsel knew the sexually explicit love letter was written before he knew Williams and was originally intended for a former girlfriend. Brief for Appellant at 36. With respect to the character testimony, Alexander claims

he had character witnesses available to testify and that counsels' failure to call them, when his character was at issue, prejudiced his case. Brief for Appellant at 33.

With regards to the "fantasy e-mail," we observe that Alexander does not deny that he sent the message to Williams. Whether Alexander wrote it for someone else or that he wrote it before his first communication with Williams is immaterial to the case. Therefore, we conclude that Alexander's IAC claim with respect to the "fantasy e-mail" is without arguable merit.

Alexander next argues that counsel rendered IAC by failing to call character witnesses. To establish an IAC claim based on the failure to call a witness or witnesses, a defendant must establish that: 1) the witness existed; 2) the witness was available to testify; 3) counsel was informed of the existence of the witness or counsel should otherwise have known of him; 4) the witness was prepared to cooperate and testify for defendant at trial; and 5) the absence of the testimony prejudiced defendant so as to deny him a fair trial. ***See Commonwealth v. Ervin***, 766 A.2d 859, 865-66 (Pa. Super. 2000).

Upon review of Alexander's brief and affidavit in support of his claim as to the availability of character witnesses, we conclude that Alexander's offer of proof is insufficient to demonstrate IAC. In support of his claim, Alexander has attached a copy of an affidavit attesting that 1) trial counsel interviewed "Mr. and Mrs. Hutton and Mr. Kutzler" (character witnesses) and 2) the character witnesses were available to testify. Brief for Appellant at Exhibit D. Despite Alexander's insistence as to the availability of these character witnesses, there is no statement from these individuals indicating their availability or

willingness to testify or that the substance of their testimony would have been beneficial to Alexander's case. ***See Ervin***, 766 A.2d at 865-66.

We also note that it is Alexander's burden to overcome the presumption that trial counsel was effective. ***See Commonwealth v. Williams***, 570 A.2d at 81. Accepting Alexander's assertion that counsel interviewed the character witnesses, he fails to demonstrate that counsel had no reasonable basis for his decision not to call those witnesses. In fact, the trial court opines that because Alexander had a prior criminal record, the presentation of character witnesses would permit the Commonwealth to introduce that record in order to impeach the witnesses' credibility. Trial Court Opinion, 10/10/01, at 16. Alexander attempts to rebut the court's suggestion by relying on this Court's disposition in ***Commonwealth v. Hammond***, 454 A.2d 60 (Pa. Super. 1982). We reasoned, in ***Hammond***, that because the defendant's prior criminal record substantially predated the character witness's relationship with the defendant, the witness could not be examined as to his knowledge of those crimes. ***See id.*** at 65. Here, however, Alexander has failed to demonstrate that his prior convictions substantially predate his acquaintance with his character witnesses. Therefore, we conclude that Alexander has failed to meet his burden of proof that counsel rendered IAC.

Alexander's fifth question merely raises additional allegations of prosecutorial misconduct based on the prosecutor's closing remarks. Brief for Appellant at 39. In response to defense counsel's closing remarks and attempt to demonstrate that Williams had deceived Alexander as to her age, the prosecutor stated the following:

> We heard [defense counsel] go on and on about her, and she's been dragged through the mud, she's been victimized by this man under the facts of this case, and they would like you to victimize her again.
>
> * * *
>
> This 15-year-old with no money who had – again this goes to the fact he knew she was 15 – had a paycheck. You know, here's a woman out working in the world. I think it was like $42. Look at her stub. . . .

N.T. Trial, 3/28/01, at 116, 122. Alexander claims that the former comment likens "cross-examination of the complainant *and an acquittal* to the re-victimization of a[n alleged] [sic] rape victim. . . . " Brief for Appellant at 40 (emphasis in original). Next, Alexander contends that the latter comment was based on evidence not of record (the pay stub) and therefore constituted prosecutorial misconduct. Brief for Appellant at 40.

First, we note that Alexander's premise that there is no evidence of record regarding the pay stub is erroneous. N.T. Trial, 3/27/00, at 227. Next, Alexander fails to demonstrate why the prosecutor's comments were not reasonable inferences that could be drawn from the evidence. To the extent Alexander argues that the prosecutor's comments liken "cross-examination of the complainant *and an acquittal* to the re-victimization of a[n alleged] [sic] rape victim. . . . ," Brief for Appellant at 40 (emphasis in original), such an argument solely represents Alexander's interpretation. This is, by no means, the only possible interpretation of these remarks. We conclude, therefore, that Alexander has failed to demonstrate that the prosecution's comments had the unavoidable effect of, forming in

the jury's mind a fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. ***See Chmiel***, 777 A.2d at 466.

Alexander's last issue on appeal challenges the legality of his sentence and contends that defense counsel rendered IAC for failing to raise the same prior to sentencing. Brief for Appellant at 47, 49. Alexander relies on this Court's merger analysis for the proposition that sentences must merge when a defendant is convicted for several offenses arising out of one criminal act *and* where one of those offenses is a lesser included offense. ***Commonwealth v. Smith***, 772 A.2d 75 (Pa. Super. 2001) (*en banc*). Alexander begins his argument by noting that the jury's verdict failed to state whether one or two acts of penetration occurred. Brief for Appellant at 47. Alexander then presumes that because the verdict does not state a finding of more than one culpable act, "no more was proved than a single act." Brief for Appellant at 48. Next, Alexander argues that the conviction of Statutory Sexual Assault is a lesser included offense of IDSI. Alexander concludes that because he believes the jury convicted him for one criminal act and Statutory Sexual Assault is a lesser included offense to IDSI, his convictions merge for the purposes of sentencing. Brief for Appellant at 49. Without reaching the merits of Alexander's substantive question regarding merger, we note that his fundamental premise is flawed.

When a general verdict is rendered, knowledge of the basis of the decision rests only with the jury itself. Therefore, it is impossible, not to mention improper, to draw specific conclusions from a general verdict. ***See Commonwealth v. Anderson***, 550 A.2d 807, 809 (Pa. Super. 1988). The law requires only that there be sufficient

evidence to support the convictions that the jury has returned. ***See id.***

Alexander presumes that because the verdict does not reveal the jury's finding with respect to how many times he and Williams had intercourse, it found that only one act occurred. Brief for Appellant at 47-48. This, however, is an impermissible presumption. ***See Anderson***, 550 A.2d at 809. A review of the trial transcript demonstrates that the jury could have found that Alexander engaged in several felonious acts of intercourse with Williams and convicted him separately of each. Specifically, Williams's testimony indicates that the couple had two sexual encounters while at Alexander's home. N.T. Trial, 3/27/01, at 124-131. The first encounter consisted of oral and anal sex in Alexander's bedroom. N.T. Trial, 3/27/01, at 124-125. Williams then stated that Alexander got dressed and watched television. N.T. Trial, 3/27/01, at 127. The couple later returned to the bedroom and again had oral sex. N.T. Trial, 3/27/01, at 129. Without speculating on the jury's deliberation, it is certainly possible that the jury found the couple had two separate sexual encounters and rendered a verdict reflecting that finding. We conclude that such a possibility precludes a discussion with respect to merger and therefore, Alexander's claim is without merit. Further, counsel could not be held to be ineffective for failing to raise a meritless claim. ***See Commonwealth v. Carpenter***, 725 A.2d at 161. Therefore, we also conclude that trial counsel did not render IAC for not raising merger at sentencing.

For the foregoing reason, we affirm.

Judgment of sentence **AFFIRMED**.

Judgment Entered.

/s/ [Illegible]
Prothonotary

Date: APR 25, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-1651

RAYMOND ALEXANDER,

Appellant

v.

ROBERT SHANNON, SUPERINTENDENT; THE DISTRICT ATTORNEY OF THE COUNTY OF BUCKS; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 03-cv-03514)
District Judge: Honorable Stewart Dalzell

SUR PETITION FOR PANEL REHEARING

Present: FUENTES, ROTH* and BECKER**, *Circuit Judges*

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* Judge Roth assumed senior status on May 31, 2006

** Judge Becker was one of the three panel members in this case. Judge Becker passed away on May 19, 2006

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing by this panel, the Petition for Rehearing is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: June 28, 2006

ARL/cc: JE; TGG; SBH